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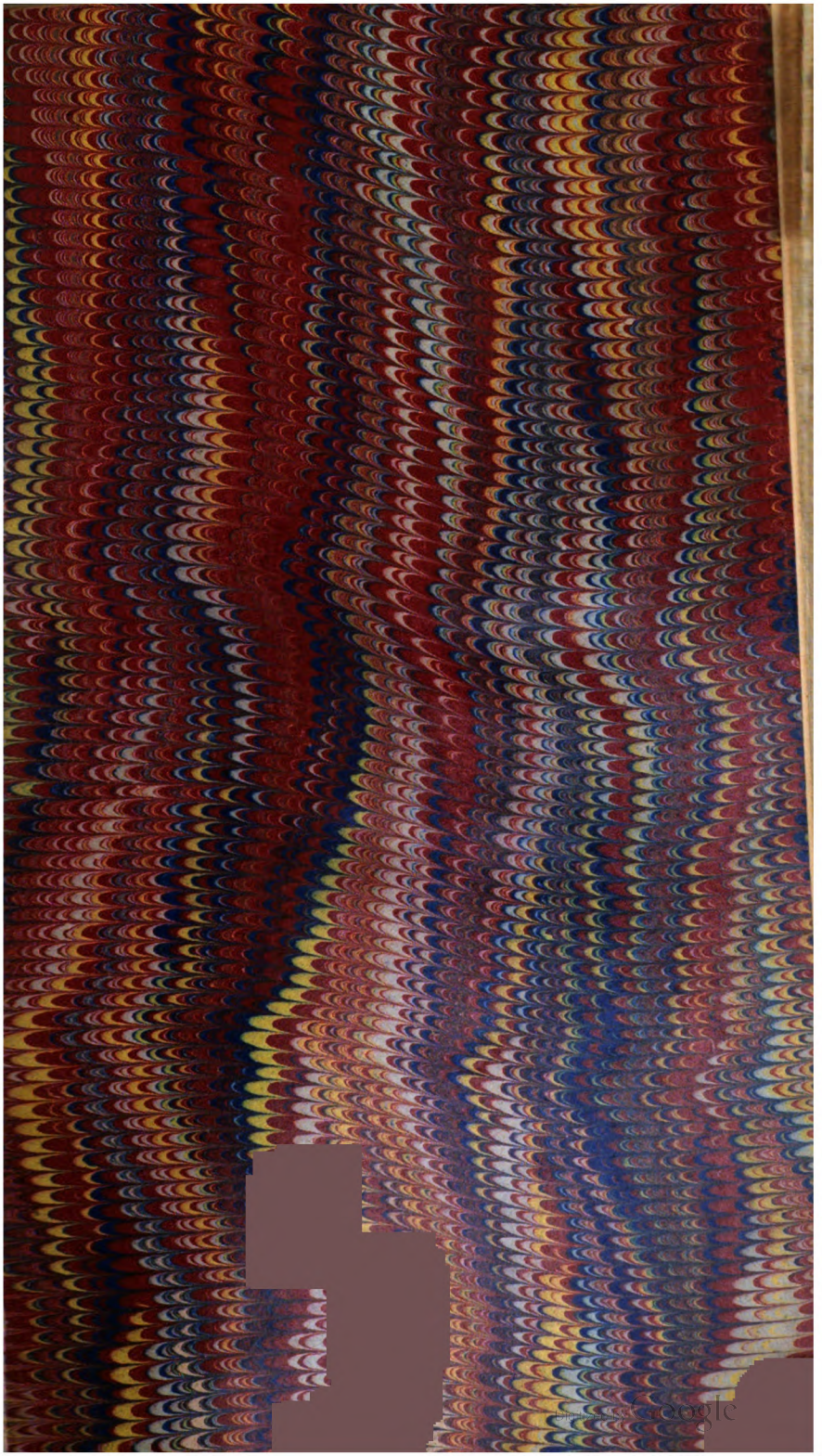
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**A N E S S A Y**  
**ON**  
**Average;**  
**AND ON**  
**OTHER SUBJECTS**  
**CONNECTED WITH**  
**THE CONTRACT OF**  
**MARINE INSURANCE.**  
**TOGETHER WITH**  
**AN ESSAY ON**  
**Arbitration.**

**DEDICATED**  
**TO THE COMMITTEE**  
**FOR MANAGING THE AFFAIRS OF LLOYD'S.**

---

**THE FOURTH EDITION,**  
**WITH CORRECTIONS AND ADDITIONS.**

---

**BY ROBERT STEVENS,**  
**OF LLOYD'S.**

---

*"All questions on Mercantile Transactions, but more particularly on Policies of Insurance, are extremely important and ought to be settled."*  
**LORD MANSFIELD.**

---

**LONDON:**  
**PRINTED FOR BALDWIN, CRADOCK, AND JOY.**

**1822.**



**C. Baldwin, Printer,  
New Bridge-street, London.**

TO  
THE COMMITTEE  
FOR MANAGING THE AFFAIRS OF LLOYD'S,  
THE FOURTH EDITION  
OF  
THIS ESSAY  
IS  
MOST RESPECTFULLY DEDICATED  
BY  
THEIR MUCH OBLIGED  
AND VERY OBEDIENT SERVANT,  
THE AUTHOR.

2-12-47 A.L.Bk.

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# Preface,

TO THE  
FIRST EDITION.

---

THE subjects discussed in the following Essay have of late years engaged much of the attention of those persons whose chief business lies in Lloyd's; and for this reason hopes were entertained by the writer, that some one among them, who might be pointed out as competent to the undertaking, would have given to the commercial world the result of his experience; and thus have been the means of putting to rest at least some of the important questions, which for want of authority to refer to still remain unsettled or open to discussion.

It is now above thirty years since any thing written expressly on the *practice* of insurance has appeared \*. If such publications were more frequent, we should probably not be in the state

\* Weskett's Digest, &c. 1781.

of uncertainty on many points which we now are; for it is by the comparison of opinions and ideas, that correct principles are ascertained.

In the absence of any practical work of late date, the writer has thought proper to go before the public; and it may not perhaps be deemed irrelevant to state, that this Essay was originally intended as part of a "Treatise on the Practice of Insurance," &c. for which he has been many years collecting materials. To that work the writer has devoted much of his attention, with the hope of making it worthy the public eye; but he has hitherto, from various causes, not the least of which is the unsettled state of the practice, been prevented from completing it.

It will be perceived that the subjects treated of in this Essay are chiefly those mentioned by the PROVISIONAL COMMITTEE OF LLOYD'S, in page 23 of their REPORT of the 19th July, 1811.

Much has been said in favour of establishing a code of insurance laws, similar to those promulgated in foreign countries; but it is appre-

hended that few persons of experience in Lloyd's will, on consideration, be disposed to recommend such a measure. It would perhaps be extremely difficult, if not wholly impracticable, to make positive laws to suit every case; and it is doubtful whether, if such were made, they would be found to answer the purpose of preventing litigation<sup>b</sup>. The object, it is conceived, would be more readily, and better attained by the mode<sup>b</sup> Marshall on Insurance, prel. disc. p. 21. above pointed out:—that of men of experience communicating their knowledge to the world. An attempt was indeed made in the year 1747, to procure an act of parliament “for the better regulating of Assurances on ships, and on goods laden thereon, and for preventing frauds therein,” &c. Leave was given, and a committee<sup>c</sup> Vide Journals of the Ho. of Com. v. 24. p. 597, and ut infra, Appendix iii. was appointed to prepare and bring in the bill; but it is almost unnecessary to observe, that it did not pass into a law.

The *practice* of insurance (as relative to the adjustment of claims arising out of the contract,) which might from its intricacy be almost denominated a *science*, is still but imperfectly understood; and, like every thing dependent on



custom and precedent, its improvement will be but gradual, until repeated examination and discussion shall have fixed it on solid principles, and have secured to them that universal suffrage which would probably never be yielded to the result of the deliberations of any particular body of men.

The great and only end of insurance, as known to, and quoted by every one, is *indemnity*; and the great difficulty in the practice is, in so accurately adjusting the claim of the merchant on the underwriter, that each party may be satisfied;—this, however, will never be, till the principles and the practice of insurance are more perfectly, and are equally well understood by both. It is indeed necessary always to bear in mind, that the general importance and even the particular utility of insurance, can never be so well maintained, as by preserving the purity of the principles on which it is founded:—in this, the assured and the insurer are equally interested.

If the writer should be so fortunate as to place

some of the subjects of which he treats in a clearer point of view than that in which they have been generally seen, his object will be attained. He has not the vanity to imagine himself capable of communicating any thing new to those who are well initiated in the principles and the practice of insurance: to such, a work of this nature must be useless; but he has at times had occasion to remark, that the commercial community in general possess much less information on this subject than is required from its importance to their interests.

In an *appendix* is given a list of the foreign laws, and of the foreign and English writers on insurance, and on maritime law; which may be serviceable as showing the sources of our information, should this Essay survive the present day.

New City Chambers,  
7th August, 1813.



# Preface

TO THE  
FOURTH EDITION.

---

THE preceding editions having been for some time out of print, the author has thought proper to publish a new edition, in which he has endeavoured to bring down the practice and the law of Average to the present day. He has added a short treatise on ARBITRATION; a subject which has of late years become exceedingly interesting to merchants and the subscribers to Lloyd's. Every means in his power have been used to make it as correct as possible; and for the errors and omissions which may be found in it, he respectfully hopes, that the circumstance of his residence being at present abroad, and thus being necessarily far from his legal and commercial friends, whom he should have felt it his duty and his inclination to have



consulted, will be considered a sufficient apology. From having himself practised for many years as an insurance and mercantile arbitrator, he is able to judge of the necessity of making the principles and practice of arbitration more generally known. To the legal writers on the subject, and to the law reporters, he feels himself greatly indebted, and he takes these means to acknowledge the obligation.

In an Appendix the author has given the substance of a letter, which he addressed a short time since to Robert Shedden, Esq. of Lloyd's, on a question arising out of the subject of Particular Average.

June, 1822.

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## PART I.

# Of Average.

---

THE books written on the law of Insurance and the ordinances of foreign countries inform us that there are three kinds of Average, viz.—General Average,—Particular Average,—and Petty Average.

The word “Average,” when applied to Maritime Commerce, is said by Cowell\*, to mean \* Cowell's Interpreter. “a certain contribution that merchants and others proportionably make towards the losses of such as have their goods cast overboard for the safety of the ship, of the goods, and of the lives of those in the ship, in a tempest; and this contribution seems to be so called, because it is proportioned after the rate of every man's *average*, or goods carried (1).” In general the

(1) The writers on Insurance are not agreed as to the *etymology* of the word “Average.”—Mr. Serjeant Mar-

meaning of the term is “a medium; or a mean proportion<sup>b</sup>.”

<sup>b</sup> Johnson's Dictionary.

Of the three kinds of average mentioned above,

<sup>c</sup> Marshall, p. 535. n.

shall<sup>c</sup> quotes Cowell, who considers it to be “derived from the Latin word—*averagium*; which comes from the verb *averare*, to carry,—and originally signified a service which the tenant owed to his lord by horse or carriage. It is said to have been introduced into commerce, to show the proportion and allotment to be paid by every man according to his goods *carried*.”

<sup>d</sup> Millar, p. 334.

Millar<sup>d</sup> thinks the word is derived from the Saxon *healf*: i.e. half, which corresponds with a word of a similar sound in all the Teutonic languages, pronounced with the *l* mute<sup>e</sup>; hence the word *halvers*, *partners*; and *halverage*, *partnership*. *Halverage*, or average loss, therefore, means a partnership loss. Perhaps the opinion of this being the most correct derivation, may meet with some confirmation from the word being written in the German, (a self-derived language,) *Haverie*. In the Dutch, it is *Averie*; in the French, *Avarie*; in the Italian and Spanish, *Averia*. If any person be particularly curious on this subject he may consult M. L. Boxhorn, (in *Dissert. ad Arnold. Vinnium J. C.*) who pretends to trace back the word to the Arabians and Scythians, from the latter of whom he says the Germans received it, and the French from them. Q. van Weytsen, in his *Treatise on Average*, says that the word is derived from the Greek *βαρος*, (which signifies *onus*, or weight, trouble, charge,) and having the privative prefixed, makes *αβαρος* (*abarus* or *avaros*)—without charge, which word is made use of when a vessel having made a jettison arrives without its entire cargo.—Be this as it may, it would require some boldness for any one to assert that he had found the true etymology of the word, after the very learned author, *Emerigon*<sup>f</sup>, having declared that it is not yet discovered, and that it is probable it never will be.

<sup>f</sup> *Traité d'Assurances*, tom. 1. p. 601.

the *first* is the only one properly entitled to the appellation.—The *second* is made use of by foreign writers, merely in opposition to the first, or as a means of showing that the damage incurred is a *particular* loss, and is not, therefore, a subject for general contribution; i. e. it is no average at all<sup>1</sup>. The *third* is composed of some of the petty and ordinary charges of the voyage; and it might as well, therefore, bear any other name as that of average. It is only in that case where the term is never used, that the appellation would be correct;—that is, when any charges specifically attach to the *cargo*:—if in such a case the ship be a general one, the shippers must all bear these charges in *proportion* to the value of their goods; and thus this may very properly be distinguished from a general average, and the term “particular average” may be correct. But this is not the way in which it is applied in Lloyd’s; there, a *particular average* on goods, means, a partial loss in their value, occasioned by sea damage.

<sup>1</sup> Sir W. Scott,  
1 Rob. Adm.  
Rep. p. 293.

Average properly means,—a contribution made by *all* the parties concerned in a sea adventure, to make good a specific loss or expense incurred by *one* of them for the general benefit.

The custom is of very ancient date; for it has a principal place in the laws of Rhodes;

which were, it is said, formed and promulgated nine hundred years before the Christian æra, and were afterwards adopted by Justinian into his Digest<sup>b</sup>. It has been justly said that “the wisdom and equity of the rule will do honour to the memory of the state from whose code it has been derived, as long as maritime commerce shall endure<sup>c</sup>.”

<sup>b</sup> *Digestorum*  
lib. xiv. tit. 2.  
*De lege Rhodii  
de jactu.*  
Seiden, *De do-  
minio maris*, &c.  
lib. 1. c. 10. s. 5.  
Huet, *Hist. du  
com. des Anc.*  
p. 86.  
<sup>c</sup> Abbott on  
*Shipping*, 4 ed.  
p. 353.

From the above definitions it may be inferred, that the word is not applicable in any case, in the first instance, to a policy of insurance; but that it is more properly connected with the rights and duties of the ship-owner and the merchant. The apportionment indeed, for the general contribution, is made (or it ought to be made) without a reference to any policies being effected.—The positive contract of insurance (1) is of many centuries later date than the implied contract of

<sup>b</sup> Grotius, lib. ii. average<sup>k</sup>.  
c. 12. § 5.

(1) We do not know when the practice of Insurance commenced in this country; but Quintin van Weytsen, who published his judicious *Traité des Avaries* in Holland as far back as 1563, places London before Antwerp—for speaking on a matter where the insurers are liable, he adds “*suivant la coutume de Londres et de la Bourse d'Anvers*.” From the author thus quoting the custom of London as an authority, we may reasonably infer that the underwriters of this great city were, two hundred and fifty years ago, as they are at the present day, pre-eminent of all others. It is worthy of observation, that

<sup>k</sup> Q. van W.  
p. 37.

It may be remarked, that the word "average" does not once occur in the body of a policy of insurance. In the memorandum of warranty at the foot of the policy, it is mentioned as distinguished from general average.

All losses not total are said to be average losses<sup>m</sup>; and so the courts of law in this country use the term.

<sup>m</sup> Pothier, *Tr. des Con. d'Ass.*  
c. 3. n. 113.  
<sup>4</sup> Taunt. Rep.  
p. 367.

this writer and others after him place the insurer in the situation (in regard to the protection of the law) of pupils or infants—he says, "*l'Assureur qui est protégé ou tenu par tout comme un pupille.*"

CHAPTER I.  
OF GENERAL AVERAGE.

---

So much has been said on this subject by the ancient and the modern writers on Marine Law, that it may not be necessary to go at length into the question; particularly as such a discussion would be out of its place in an Essay. It is therefore my intention chiefly to consider,—*what constitutes a claim to a General Contribution; and the Nature and Value of the Interest to contribute.*

SECT. I.

OF GENERAL AVERAGE LOSS.

A claim for a general contribution may arise from two causes:—*First*,—from a sacrifice deliberately made of the property of one of the parties concerned in the adventure, for the benefit of the others; and whereby *his* loss is directly converted to *their* gain;—for this he has

a right to claim *Restitution*";—according to the equitable maxim of the civil law, *Nemo debet locupletari aliend jacturâ*;—"no one ought to profit by another's loss (1)." *Secondly*, a claim may arise from expenses incurred, or services performed, by one party,—(e. g. the ship-master,) for the general benefit;—and for this he has a right to claim a *Recompense*. But where neither of these principles will apply, no contribution ought to be demanded.

The requisites necessary to make valid a claim of this nature are as follow:—When *Restitution* is demanded,—the ship must be in actual distress; the thing intended to be destroyed must be expressly selected for that purpose;—the sacrifice must be made *premeditatedly* and *deliberately*; and the end in view must be no other than that of the general preservation.

(1) That this maxim is not always to be construed literally may be illustrated as follows:—if of two ships laden with corn one be lost at sea, the corn on board the one which arrives may sell at a higher price, and thus a profit will be gained by another's loss. It appears therefore that this maxim, like most general maxims, is apt to mislead by being too comprehensive. Reflecting on this subject we find that nothing which a man acquires by his own means, or by accident, however connected with the loss sustained by another, will ever, independently of some personal connexion, bind him to make up that loss out of his gain.

*Dig. Leg. Rhod. art. 2.*  
*Consol. del Mar. For. Ord.*  
*passim.*  
*Q. van Weytsen, Tr. des Av. p. 5.*  
*Domat. Lo. Civ. l. 2. tit. 9.*  
*Magens, p. 55.*  
*Weskett, p. 130.*  
*Pothier, Sup. Cont. de L. n. 106.*  
*Emerigon. c. 19. § 39.*  
*Kaimes' Pr. Eq. b. 1. p. 1. c. 3. § 2.*  
*Park, p. 121.*  
*Millar, p. 335.*  
*Marshall, p. 536.*  
*Benecke, n. 90. &c.*

*Q. v. Weyt. n. p. 18. Stracc. de Nav. p. 2. n. 19.*

*Kaimes' Pr. Eq. ut sup.*



Abstractedly considered, the mind and agency

Abbott, p. 355. of man must be employed<sup>9</sup>;—the act must be preceded by foresight, and attended by volition.

—And, moreover, it must have the desired ef-

fect, i. e. the vessel must be preserved'. It

<sup>9</sup> *Leg. Rhod.*

*l. 4. § 1.*

*Ord. Fr. 'du Jet.'*

*art. 15.*

*Poth. C. de L.*

*n. 113.*

would be going too far to say that its preservation must be the direct consequence of the act,

—for of that no one can judge;—but it must

be preserved at the time'. For, if the whole be

<sup>9</sup> *Leg. Rhod.*

*l. 4 & 5.*

*Le Guidon, c. 5.*

*art. 28.*

*Poth. C. de L.*

*p. 2. § 1. art. 1.*

*Emer. c. 12.*

*§ 41.*

*Ord. Fr. ut sup.*

*& For. Ord.*

lost, there can be no claim for restitution; nothing having been gained by the loss, and neither party being better nor worse for the sacrifice.

But it is said, that in all cases of a sacrifice for the general good there must be a sufficient cause.

For if jettison (*e. g.*) be made on a false alarm,

it cannot be said that the jettison procured the safety of the vessel—jettison cannot therefore in

this case give rise to contribution'. When *Re-*

<sup>9</sup> *Poth. C. de L.*

*ut sup.*

*compense* is claimed it must be clearly shown

that services have been performed out of the ordinary course of the voyage; and which had no

partial advantage in prospect, but were abso-

lutely intended for the general benefit.

Thus far as to the *general principle* of Average

Contribution:—The following articles contain,—

FIRST, the causes of general average claims, as they may be collected from the foreign laws and ordinances; the ancient and modern writers;

and the practice of the present day; on which there is *no dispute*: and SECONDLY,—those cases which are *unsettled and doubtful*—or are not allowable by the law of England.

*Article I. Of the Claims for General Average Contribution on which there is NO DISPUTE.*

[1.] JETTISON<sup>a</sup>.—The most ancient and legitimate source of general average contribution is *jettison*. The justly famous digest of Justinian (before mentioned) under title ii. of the fourteenth book, adopts the laws of Rhodes on Jettison. By them it is decreed that, “if to lighten a ship in distress a jettison be made, that which is thrown away for the general safety shall be restored by a general contribution.” It was the custom in former times (according to the simplicity of ancient commerce) for the merchants to sail with, and take personal charge of their goods. To this custom, that ancient collection of “the usages of the sea,”—the *Consolato del Mare* (1), and the foreign ordinances allude

<sup>a</sup> Dig. l. 14.  
Leg. Rhod. 2. 1.  
Leg. Oler. 8.  
Leg. Wisb. 20.  
Q. van. Weyt.  
p. 5.  
Stracc. Tr. de  
Naut. p. 3. n. 11.  
Molloy de Jure  
Mar. l. 2. c. 2.  
§ 6., &c.  
1 Mag. p. 64.  
Weskett, p. 255.  
Ord. France,  
art. 6. “des  
Av.” Poth. &  
Val. sur. l. m.  
Emer. ut sup.  
For. Ord.

(1) *Il Consolato del Mare*, from *Consulado*, (Spanish) a Consular Court.

It is a matter of surprise that this code of laws or rather

when they provide that if the merchants be on board their consent shall be asked before the jettison is made;—but it is added, if they refuse, the master may proceed without it<sup>v</sup>.

<sup>v</sup> *Il Con. del*  
*Mar. c. 91. "Di*  
*Conserva."*  
*Q. van. Weyt.*  
*p. 8.*  
*Ord. Fran. art.*  
*" du Jet."*  
*Valin, Pothier,*  
*Emer. sur l. m.*

Because it is presumed the master and his crew have more experience in maritime affairs than

ancient collection of sea customs, which has appeared in most of the European languages, has never (as I can learn) been translated into English.

"The above title seems to have been given to it in the fifteenth century—for *Alexander Raudense*, who wrote in 1491, says that this collection was called 'Barcelonian laws.' *Ceelles*, however, a Catalan, who printed an edition in the year 1494, calls it in his preface 'Consulat.' Perhaps from the Consuls at Barcelona having used the work

<sup>w</sup> Boucher, p. 45. as a code of maritime law <sup>w</sup>." ut infra.

The true "*Consulat*" has only 294 to 296 Chapters, but some of the Castilian, German, and Italian translations have 361 to 365 Chapters; or, as we should call them, "Articles." *Casaregis* published an Italian translation, (Venice, 1566) with excellent commentaries by himself; and in 1577 *Meyssoni* published a translation in the French language; this was reprinted in 1635<sup>x</sup>. *G. B. Pedrezzano* also published an Italian translation (Venice, 1599). An Italian and Dutch edition was printed at Leyden in 1704.—A French translation, said to be from the original Barcelonian edition of 1494, was published in 1808, at Paris, by *P. B. Boucher*, the writer quoted above. The two latter editions are in the library of the LONDON INSTITUTION as are *Roccus* and *Bynkershoek* mentioned below.

<sup>x</sup> Emerigon,  
pref. vi.

So early as the thirteenth century this code is said to have been received as law in Italy, the Greek empire,

the merchants';—and, *Q. van Weytsen* says, 'Valin, ut sup.  
"because every one is most learned in his own

France and Germany; and most of the marine laws in Spain, Italy, France and England are borrowed from it<sup>2</sup>.

<sup>2</sup> Emerigon ut  
sup. vide Grot.  
*De jure bel.* l. 3.  
c. 1. § 5. n. 6.  
Vinnius in  
*Pactum*, 190.  
Park, pref. xxv.  
Marsh. prel.  
disc. 16.

A selection from several of the foreign writers on insurance and maritime law might be useful to the practitioners in Lloyd's, few of whom would take the trouble to go through the works themselves, some of which are bulky and voluminous.

Among others may be particularly mentioned the following:—

*The DIGEST*, Book xiv. title 2. (*De legia Rhodia de jactu.*)

ROCCUS, (*de Navibus, et Naulo.*)

BYNKERSHOEK, (*Quæstionum Juris Privati*—Lib. iv.)

QUINTIN VAN WEYTSËN, (*Traité des Avaries.*)

Those parts of VALIN (*Commentaire sur l'Ordonnance de Louis XIV. touchant la Marine, donné à Fontainebleau du mois d'Août, 1681.*) Of POTHIER, (*Supplément au Traité du Contrat du Louage, et Traité des Contrats d'Assurance*) and of EMERIGON, (*Traité d'Assurances*) which relate to the general principles of Insurance and Maritime Law.

*Roccus*, *Bynkershoek* and *Valin*, are particularly noticed by lord Mansfield, in his excellent observations on the judgment of the court of king's-bench on Insurance cases.

The *Consolato del Mare*, *Loccenius*, (who I believe is meant in Burrow's Law Reports by "*Coccenius*,"\*) and

\* By *Coccenius* could scarcely be intended *Cocceius*;—for neither father nor son wrote on insurance—the father was an eminent French writer on public law and public rights;—the son only edited his father's works.

<sup>a</sup> Q. van Weyt. p. 33. trade or calling<sup>a</sup>. Jettison may be made, generally, in all cases where the ship is in distress: but the chief causes are to lighten the ship at sea in a storm,—or when pursued by an enemy(1),—or for the purpose of floating her when she accidentally gets aground. In all cases of jettison where contribution is expected, the goods

*Bynkershoek*, are also frequently quoted by the present learned judge of the Court of Admiralty. The *Consolato del Mare* he considers as a book of great authority.

It is often said in Lloyd's that foreign authority is useless to us,—but it should be generally known, that a learned judge, whose legal knowledge cannot be doubted, (Mr. Justice Lawrence) has said, “the opinions of foreign writers should have great weight with us, as their doctrines form the greatest part of our laws on the subject of insurance<sup>b</sup>.” It may be said with great truth, that before a person can be well-grounded in the *principles* of insurance, he must have read and studied the foreign ordinances and foreign writers, from whom we derive almost all our knowledge on this (to us as a commercial nation) most important subject.

<sup>b</sup> 2 East's Rep. p. 547.

(1) The throwing overboard part of the cargo, though of course a jettison, is not to be made good by general average contribution unless it be strictly for the purpose of effecting the escape of the ship. This was so determined in a late case; where the captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was chased, threw them into the sea. The underwriters on the dollars were held to be liable for this loss under the head of “all other losses and misfortunes<sup>c</sup>.”

<sup>c</sup> 3 Bar. & Ald. Rep. p. 398.

thrown overboard must have been stowed under the deck, none can be demanded if the goods lie upon the deck,—though if saved they must bear their proportion<sup>d</sup>. But if goods got on deck for the purpose of jettison, or to ease the ship when in distress, be washed off the deck, this is to be treated as a jettison. Another exception has been made to contribution;—the want of a bill of lading, which it is said makes it presumable that the goods have been put on board without the captain's knowledge<sup>e</sup>.

<sup>d</sup> For. Laws & Ord. &c. &c.

<sup>e</sup> Poth. ut sup. p. ii. § 1. art. 2.

If on the jettison being made, the ship continue her course, but be afterwards wrecked, what is saved from such wreck must contribute to make good the jettison.<sup>f</sup> But on the contrary, if the goods jettisoned be fished up, and taken on shore, and the vessel proceeding on her voyage be afterwards lost,—the goods saved shall not contribute towards such loss, because the loss of the vessel arose from an accident<sup>g</sup>. And in like manner, for the same reason, if goods be put into boats or lighters to float the ship when aground, or to enable her to pass over any flats or shoals, and the boats be lost, this shall be considered as a jettison, and the remaining property must contribute;—but if the ship should be lost and the goods in the boats be saved, then the owners of such goods shall not contribute:

<sup>f</sup> Leg. Rhod. 4. 1. "Si navis que," &c. Le Guidon, c. 5. art. 29.

Q. van W. p. 26. Vin. in Peck. 246, 250. For. Ord.

<sup>g</sup> Leg. Rhod. ut sup. Q. van Weyt. p. 27. Kaimes' Pr. Eq. b. 1. p. 1. c. 3. § 2. 2.

for it is said, the lightening of the ship was in consequence of *a voluntary and deliberate determination*<sup>b</sup>, and was done for the good of the whole; but, as in the preceding case, the ship being lost was in consequence of an accident<sup>c</sup>. The master having had just cause for the jettison shall be exonerated, but it does not give rise to contribution unless it shall save the vessel<sup>k</sup>.

It may appear almost unnecessary to observe, that ship's stores thrown overboard, while the cargo is on board, must also be made good by a general contribution (1).

[II.] DAMAGE DONE TO THE CARGO<sup>l</sup>, by cutting holes in the ship, or by opening the hatches for the purpose of effecting a jettison; or by getting the Goods on Deck to heave overboard.

It is very difficult in some cases (particularly in regard to perishable articles), to discriminate whether the damage done to the cargo happens from these causes or from the shipping of seas

(1) The value to be made good by general average contribution is that at which the stores are or can be replaced. —But when washed overboard or plundered the value to be paid by the insurer should strictly be the cost; that being the value on which he received a premium.

<sup>b</sup> Vide infra art. 2. [a]

<sup>c</sup> *Leg. Rhod.* ut sup.  
*Leg. Wisb.* 55.  
*Q. van Weyt.* p. 24.  
*Roccus De Nav.* not. xxi. n. 57.  
85. <sup>e</sup>  
*Stracc. De Nav.* p. ii. n. 19.  
*Poth.* p. ii. §2.1.  
<sup>1</sup> *Malyne*, c. 25.  
*Molloy*, § 12.  
*Emer. c.* 12. § 41.  
<sup>1</sup> *Mag.* p. 56.  
*For. Ord.*

<sup>k</sup> *Leg. Rhod.* ut sup.  
"Merces non possunt," &c.  
<sup>l</sup> *Leg. Rhod.* ut sup.  
*Ord. Rot.* 85.  
*Bilboa*, 12, 13.  
*France "des Av."* 6.  
*Val. Com.*  
*Q. van Weyt.* p. 7.  
*Emer. & Poth.* ut sup.



and the working of the vessel; but when these are clearly proved to be the cause, there is no doubt that the loss should be made good by a general contribution.

[III.]<sup>m</sup> DAMAGE DONE TO THE SHIP, *by cutting holes to effect a jettison, or to let out the water.* <sup>n</sup> Vide Auth. ut sup. et inf.

[IV.] CUTTING FROM, OR SLIPPING FROM ANCHORS, *to avoid running ashore or on the rocks, or being run foul of by other ships; or when run foul of, for the purpose of getting clear.*

[V.]<sup>n</sup> CUTTING AWAY THE MASTS, SAILS, BOATS, &c. *when the ship is in distress, and the general safety appears to require such sacrifices.* <sup>n</sup> Leg. Rhod. 2. § 1.  
Leg. Oler. 9.  
Leg. Wisb. 12.  
Ord. France, &  
For. Ord. passim.  
Q. van Weyt.  
p. 5. also p. 19. n.  
Emer. c. 12. § 41.  
Poth. C. de L.  
p. ii. § 2. art. 3.  
<sup>1</sup> East's Term  
Rep. p. 220.

On these two last sources of claim [iv. and v.] it may be remarked, that masters of ships should be aware that it is not merely the making use of the axe or the knife on the masts, ropes, or sails of the ship which constitutes a claim for a general contribution.—Nothing but a case of imminent danger will entitle the owner to make a claim of this nature; and the sacrifice must at least be the apparent cause of extricating the ship from her perilous situation. Foreigners ap-

pear to expect that every mast that is sprung, or sail that is split, when on a lee-shore, should be made good by a general contribution; and more particularly if they are afterwards obliged to cut them away: but these losses may, and very often do happen in the ordinary course of the voyage; and it would be well for them to know, that it is not the custom of this country to allow such claims, except perhaps in cases of very imminent danger;—and even then indeed a loss of this kind ought not to be claimed as a general average, but is of the nature of a partial loss of the ship.<sup>o</sup>

• Vide inf.  
Partial Loss on  
Ships, part I.  
c. iii. [ix.]  
p Ord. Rott.  
Bilb. &c.  
Q. van Weytsen,  
p. 8.  
Casaregis disc.  
46. n. 9.  
Emer. ut sup.

Some of the foreign ordinances<sup>p</sup> say, that if a cable be cut or slipt to sail with convoy, the value shall be brought into a general contribution;—but this is not the practice with us.

With regard to the boats, it is said that they must be cut away from the ring-bolts to which they are lashed upon the deck, and thrown over-board<sup>q</sup>. For if outside the ship<sup>r</sup> they are in the same situation relative to the loss, as goods which are on the deck, and their value must contribute to a general average, though it cannot be demanded in case of loss. If however they were properly lashed to the *quarters*, it is customary to consider the loss by cutting away as general average; but not so when hung to davits

q Ord. Rott.  
Copen. &c.  
r Q. van Weyt.  
p. 11.

over the *ship's stern*, that being considered an insecure place for a boat.

When a mast is carried away or sprung, and in consequence, the sails and rigging which are hanging over the ship's side are obliged to be cut away, some foreign authorities say that the value, after being thus damaged, shall be made good by average contribution\*. But it should be remarked, that the situation in which these articles are placed by the breaking of the mast, renders them of no value whatever.

\* Ord. Königs-  
burg, art. xxv.  
Ord. Copen.  
art. 1. § 10. &  
others

When the cables are cut, the masts cut away, &c. to prevent the ship from foundering at sea, and she is afterwards run or driven on shore, and thereby becomes irreparable,—the loss occasioned by such cutting, (if considered at all as a general average claim,) is not to be made good to the owner by *new*, with the usual allowance; but he is to have only the *true* or *estimated* value, as well as it can be ascertained by the sale of the ship and materials salvaged,—for this is his actual loss.

[VI.] SAILS, ROPE\$, AND OTHER MATERIALS CUT UP AND USED *at sea* for the purpose of stopping a leak, or to rig jury-masts, or for any purpose where the general safety appears to require the sacrifice.

No authorities are requisite to show that this is a proper subject of general contribution.

[VII.] LOSS ON PART OF THE CARGO *obliged to be sold for the purpose of paying the expenses incurred in a foreign port, where the ship put in in distress, to enable her to proceed on her voyage.*

It appears but reasonable that the sale of the cargo should be adopted as the last resource\*, both from there being no means of consulting the owner, and from the apparent impropriety and injustice of disposing of another's property without his consent;—but in a case of urgent necessity, such as this, the maritime law will justify the master (1). It then becomes neces-

\* Ord. Bilb.  
§ xx.

(1) From the judgment of the Admiralty court, on the case of the *Gratitude*†, and from a late adjudged case in the court of King's bench‡, there appears to be no doubt as to the right of the master to sell *part* of the cargo in a foreign port, in case of absolute necessity, and to enable the ship to prosecute the voyage. It was contended in the former case, that the master had no right to *hypothecate the cargo* for the repairs of the *ship*; and also, that he could not bind the proprietors of the cargo in any case. But the learned judge determined, that in case of “instant, unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon the master.” And to show his full and complete controul over the cargo, (*at sea*.) the judge instanced the case of jettison, wherein, if the lives of the crew cannot otherwise be saved, he may

† 3 Rob. Adm. Rep. p. 255.  
‡ 2 Stark. Rep. p. 1.

sary to make some inquiry as to the subject of *restitution*. This should, like all other cases where a sacrifice is made, be treated as a jettison

throw the *whole cargo* overboard;—the only obligation will be, that the ship should contribute its average proportion<sup>1</sup>:—by which means the little that is to be taken as the remnant of the cargo is preserved. And, in case of ransom, (though not legal in this country,) by the general maritime law, the master could bind by his contract the whole cargo. The books (Sir Wm. Scott observed) overflow with authorities, on the right of the master to sell part of the cargo—but it is to be noticed that this power does not extend to the *whole*, because it cannot be for the benefit of the cargo that the whole should be sold, to repair a ship which is to proceed empty to the place of destination.—But the master may *hypothecate the whole*<sup>2</sup>;—which the learned judge considered as equivalent to the *sale of a part*<sup>3</sup>.

<sup>1</sup> 3 Rob. Adm. Rep. p. 258.

<sup>2</sup> 3 Rob. Adm. Rep. p. 263.

<sup>3</sup> Idem, p. 264.

On a former occasion<sup>4</sup>, he stated generally, that the master, under circumstances of necessity, has a right to hypothecate either ship or cargo, or to sell the cargo, or to throw any part of it overboard.

<sup>4</sup> 1 Rob. Adm. Rep. p. 292.

In the course of the judgment on the *Gratitudine*, Sir Wm. Scott observed, that where a ship could not proceed on her voyage the master was empowered to tranship the cargo<sup>5</sup>; yet, he added, (*and it is very material to be known in Lloyd's*)—"though empowered to tranship,—he is not bound to tranship:—no such obligation exists according to any known rule of the maritime law."

<sup>5</sup> Leg. Oler. art. 4. Ord. France, & Valin, &c. thereon. Ord. Ant. Rott. &c.

It should also be well understood that the master is not justified in breaking up the adventure by selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, and although a sale of the cargo is the most beneficial course for the owner. Lord Ellenbo-

<sup>6</sup> 2 Mag. pp. 14. 104. <sup>7</sup> 2 Bur. Rep. p. 889. Abbott, p. 251.

—for it is the same thing to the merchant, when the goods are taken from under his controul, whether they are sold or thrown into the sea.

But the question has arisen,—where there is a *profit* on the sale of the goods instead of a loss,—who is to have the benefit of it? This question is readily answered if we treat the case on the broad ground of considering it as a jettison, and by which we shall put the proprietor in the same situation as the proprietors of the other part of the cargo, viz. by paying him the estimated proceeds at the port of discharge, as if his goods had arrived. Thus, it is submitted, that the parties who would have borne the loss ought to receive the profit; and which will be done by deducting the proportion of the amount from

rough said, “to allow the master such an unlimited dominion over the ship and cargo would tend to the destruction of all commercial adventures<sup>b</sup>.”

<sup>b</sup> 2 Stark. Rep.  
p. 3.

The *Consolato del Mare* states, that if the master be in want of money for the use of the vessel, and cannot procure it, and is in a place where there are no resources, (“*in loco sterile*,”) then, if the merchants (who are with their goods) have no money, they must sell some merchandise for the purpose of freeing the vessel.—The merchant shall however be convinced that the proceeds are for the use of the vessel; i. e. to enable her to pursue the voyage<sup>c</sup>. The Ord. of Bilbao says, if the captain cannot obtain money on *credit*, or on *bottomry*—he may sell part of the cargo to pay his expenses<sup>d</sup>.

<sup>c</sup> *Il Cons. del  
Mar.* p. 105.

<sup>d</sup> Ord. Bilbao,  
§ xx.

the *average charges*, in precisely the same manner as the proportion of the loss is always added to them. For, it may be asked,—on whose account, or rather, on what account, does the master dispose of the goods? The answer is,—certainly not on account of the proprietor of them. He is guaranteed against all possible loss, and therefore he can have no concern with the event of the sale (1). The master in fact having no other means of raising money, takes these goods indiscriminately from the rest of the cargo, and disposes of them for the general benefit of all concerned, for the purpose of setting the ship forward on her voyage; and by treating this as a jettison justice is done to all parties.

(1) Perhaps it may be useful to mention, that in a late case (not yet reported) the court of king's bench determined, where goods were sold by the master for payment of the necessary expenses, (as above) that the proprietor of the goods so sold could not sue his underwriters, but that his remedy was against the owner of the ship. We imagine it is not to be inferred from hence, that the owner is accountable to the consignee for the *proceeds* of the goods, and not for their *market price* at the port of discharge, as is customary, for this was not the question at issue; but that this is applicable where the owner of the ship fails in the interim of her arrival; in which case the underwriters on the goods would not be accountable for the loss, as it did not arise from any of the perils insured against.



\* 3 Bar & Ald.  
Rep. p. 237.

We are aware that the opinion of one of the learned judges of the court of king's bench is contrary to this<sup>e</sup>; but it is submitted with great deference that it is on mistaken grounds: that learned person supposing that the owner of the ship would put the profit in his pocket, and thus that the case might occur where the master of the ship, (his servant,) might dispose of the cargo for his benefit.

If the ship arrive at her port of destination, the loss occasioned by the sale at the intermediate port will also become a subject of *restitution*. But if the ship should not arrive in consequence of a new accident, and she should discharge her cargo at the port where she is obliged to put in, and she can proceed no farther, then the value should be that of the like goods at such port,—for it is said in case of jettison—“ the value is, that of the price current at the place of discharge where the contribution is regulated, which is *either* the port of destination, *or* the port at which the vessel is obliged to discharge, in consequence of a new accident, which has prevented her from proceeding any further on the voyage<sup>f</sup>. And this appears reasonable, for the person from under whose controul the goods are taken, for the benefit of

<sup>f</sup> Pothier, *Sup.*  
*Com. d. L.*  
n. 128.

others, ought not to be placed in a worse situation than those whom he has been the means of benefiting.

[VIII.] FREIGHT OF THE GOODS *sold for the above purpose.*

It appears clear that in this case the owner of the ship ought not to lose his freight—any more than the proprietor of the cargo the profit on his goods.

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It will occur to every one in the habit of considering questions of this nature, that there is an essential difference between a claim for *Restitution* and one for *Recompense*. In the former case, e. g. in that of *jettison*, if at any subsequent period of the voyage the remainder of the cargo be lost, there is no claim to replace that part which was jettisoned—and the same if the *ship* be lost before the articles sacrificed were replaced. But in the case of *expenses* incurred with a view towards the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port, or the ship owner himself. The former is a case lying strictly within the adventure; for if a part be sacrificed and the remainder be lost,—the whole

is lost. But in the latter case, the expenses are *extraneous*, and were incurred under an implied obligation of indemnity on all the parties;—which is one of the duties each of the parties who are joined in a sea adventure takes upon himself.

The following items come under the head of *Recompense*:—

[IX.] PILOTAGE *on putting into a port in distress.*

[X.] EXPENSES OF UNLOADING THE CARGO, *either for the purpose of repairing the ship, or for floating her when she accidentally gets aground.*

This is to be made good by general contribution; because the ship, cargo and freight are equally interested:—the *ship* that she may be repaired;—the *cargo* (in which is the *freight*) that it may be preserved. It is different as respects the unloading the *ship's stores*, after the cargo is out, for with them the cargo and freight can then have no concern.

[XI.] EXPENSES OF GETTING THE SHIP  
OFF THE GROUND.

Pothier observes, after Valin<sup>a</sup>, in case of tem-<sup>a</sup> Poth.Sup.Con.  
pest, chase, or other accident: If to prevent <sup>d. L. n. 145.</sup>  
shipwreck or capture, it be necessary to run the <sup>Val. Com. Ara.</sup>  
ship into a harbour, *not the place of her desti-* <sup>"des Av."</sup>  
*nation*, and which cannot be entered without  
discharging part of her cargo, this, as well as  
the expense of getting her afloat (if on shore)  
are general average. But he afterwards justly  
observes<sup>b</sup>,—that when for the purpose of run-<sup>b</sup> Poth. ut sup.  
ning the ship into her port of *destination* it <sup>n. 146.</sup>  
is necessary to lighten her, the master, who knew  
or ought to have known the capacity of the port  
to which he was bound, is in fault for having  
too heavily laden her. It is therefore in this  
case the fault of the master, and in consequence  
not general average.

[XII.] <sup>1</sup> HIRE OF EXTRA HANDS TO PUMP <sup>1</sup> East's Term  
THE SHIP, *after her having sprung a leak.* <sup>Rep. p. 220.</sup>

[XIII.] ALL EXTRA CHARGES *incurred for*  
*the general good, on putting into a foreign*  
*port in distress*<sup>1</sup>.

The common law<sup>a</sup>, as far as it has had cog-  
nizance of these cases, considers that all the  
foregoing charges together with the warehouse

<sup>1</sup> Leg. Wisb.  
p. 55.  
Molloy, 2. 6. 5.  
Wellwood, tit.  
20.  
Val. Com. 82,  
&c.  
<sup>a</sup> 2 Term Rep.  
K. B. p. 407.

rent and reloading charges of the cargo, ought to be made good by a general contribution. The foreign laws are to the same effect. No regular judgment has been given by the court of Admiralty; (whose peculiar province it is to determine these questions,) but on one occasion its bearing appeared to be towards a confirmation of the above<sup>1</sup>: on another occasion, however, it is admitted that in some cases "the expenses severally may be matter of simple average"<sup>2</sup>; by which appears to be meant, according to the practice of Lloyd's, and to the customary decision of the *registrar* and merchants in such cases, that all the charges incurred expressly for the general benefit are to be placed to the *general average*; those incurred for the preservation of the goods, to the *cargo*; and the outward charges, whereby the ship is again set forward on her voyage, to the *freight*. But if this be consumed by the wages, then these charges must be borne by the ship and cargo alone.

None of these charges ought to be made good by a contribution, if the ship put into a port merely in consequence of contrary winds, or for the purpose of procuring water and provisions; in both these cases the charges come under the head of petty average.

<sup>1</sup> 3 Rob. Adm. Rep. p. 255.

<sup>2</sup> 1 Rob. Adm. Rep. p. 298.

[XIV.] THE SUM AWARDED, OR AGREED TO BE PAID TO SHIPS, BOATS, PILOTS, &c. for bringing a ship, when at sea in distress, into port; or for unloading the ship and getting her off the ground when forced on shore. Also THE CHARGE OF TAKING OFF ANCHORS, CABLES, &c. and RENDERING ASSISTANCE GENERALLY".

\* Stat. 12 Anne,  
c. 18.  
3 Geo. I. c. 13.  
26 Geo. II.  
c. 19. § 10.

It is not so generally known as it ought to be, (or if known it is not practised,) (1) that a reduction may be obtained from the amount of salvage in almost all cases of vessels being driven or forced on shore in the kingdom of Great Britain. By the statute of the 5 George I. c. 11, § 13 (made in explanation of that of the 12 Anne, c. 18,) it appears that the salvage and charges may be reimbursed out of a sale of part of the cargo *duty free*. Which is in effect,—a reduction of such duties from the amount of the salvage and charges. It is not always for the interest of the proprietor of the cargo, that part of it should be sold at the time of the stranding

(1) It is of material consequence that underwriters should be aware of this, as they are ultimately the sufferers when it is omitted to be taken advantage of; for as the owner of the ship and the proprietors of the cargo look to them for their reimbursement of the salvage, they are not interested in the reduction of the amount.

for this purpose, but this difficulty may be obviated, for the average claim may be adjusted by means of an *estimate* of the duty being procured at the Custom-house.

[XV.] SALVAGE *to men of war, and to privateers* FOR RE-CAPTURE *from the enemy,—and charges thereon* (1).

• 43 Geo. III.  
c. 160. § 39.

The salvage fixed by law<sup>o</sup>, to be paid on the re-capture of British property by king's ships, is

¶ 2 Stark. Rep.  
p. 3.

¶ Stat. 29 Geo.  
II. c. 34.  
43 Geo. III.  
c. 160.

¶ Lord Mans-  
field.  
2 Burrow's  
Rep. 1209.

(1) Much abuse has prevailed in the West Indies in cases of capture and re-capture: the practice was, till lately, to sell both ship and cargo to pay the amount of salvage; and the consequence often was, that the proceeds lay for months, and even years, in the hands of the *agent* (as he is called) of the Vice Admiralty court, who thus made it his interest to put an end to the adventure; and this even in cases where ships have put in in distress and when they might have been repaired at a small expense and proceeded on the voyage<sup>p</sup>. It might be useful, however, if it were generally known, that in case of re-capture the property by law reverts to the original owner, and is only *pledged* to the re-captor for the payment of the charge for salvage; which being done, the owner is entitled to restitution<sup>q</sup>. The re-captor has no right to sell the property. If there were any difference about the value, the court would order a commission of appraisement<sup>r</sup>, when so much of the *cargo* might be sold as would pay the amount of salvage. In explanation of this, and to prevent abuses of this nature, the Privy Council on the 15th May 1813, published an order in the Gazette, pro-



one-eighth (1) ;—and by a private ship of war, one-sixth, of the true value of the property so retaken from the enemy. When a ship has been voluntarily abandoned by the enemy, the salvage is not limited by the prize act. A moiety has in some cases been given<sup>1</sup>.—Nor is the salvage limited in extraordinary cases, such as ships being abandoned at sea, &c.

<sup>1</sup> Edwards's  
Adm. Rep. p. 80.

[XVI.] MONEY OR GOODS GIVEN BY NEUTRALS (*as regards Great Britain*) to an enemy, as a composition to release the ship and the remainder of the cargo<sup>1</sup>.

The giving of money or goods to a pirate to release a ship which he had captured was, as will be seen by the references in the margin, a very ancient source of general contribution ;

<sup>1</sup> Leg. Rhod.  
art. 2. § 3.  
II Con. del M.  
c. 227.  
Le Guidon, c. 1.  
Q. van Weyt.  
p. 19.  
Ord. Fr. &c.  
Poth. C. de L.  
p. ii. § 2. art. 1.  
Emerigon,  
c. xii. & vide  
authors cited by  
him.

hibiting the sale of ships and their cargoes for the payment of salvage.

The present venerable and learned judge of the Admiralty court has noticed in terms of reprobation, the frequent applications made to the Vice-Admiralty courts in the West Indies for the sale of vessels and cargoes<sup>2</sup>; (alluding to cases where condemnations had been procured of vessels not being sea-worthy :)—this he understood to be a matter of great complaint.

<sup>2</sup> 3 Rob. Adm.  
Rep. p. 260.

(1) The rule in France is, in case of re-capture to give a third of the value of the property salvaged to the recaptor<sup>3</sup>.

<sup>3</sup> Ord. Louis  
XIV. & Val.  
Com. l. iv.  
tit. 9. art. 26.

and it was formerly the practice to ransom *British ships*, when captured by an enemy. This was done by delivering to the enemy what was called a ransom bill; which was considered as a contract of the law of nations<sup>u</sup>, and actions were maintained on it in our courts of common law. It is now by statute<sup>x</sup> made illegal to ransom any British ship taken by the enemy. This statute it is said has put an end to all questions on the law of ransoms<sup>y</sup>. And from its comprehensive words, it would seem that *pirates* as well as *belligerents* are intended—for the words are, “the subjects of any state at war with his majesty, or *any person* committing hostilities against his majesty’s subjects.”

<sup>u</sup> Burlamaqui, *Pr. du Dr. Nat.* p. iv. c. 4.  
<sup>v</sup> Vattel, l. iii. c. 16. § 233.  
<sup>w</sup> Grotius, l. iii. c. 21. § 1.  
<sup>x</sup> 22 Geo. III. c. 35.

<sup>y</sup> Marsh. p. 505.

[XVII.] CHARGES *incurred in OBTAINING THE RELEASE of a ship which had been unjustly detained.*

Many late decrees of the Admiralty court against foreign ships brought in and detained by British cruisers have been, that the *cargo* shall bear all the expenses. It may be submitted, that in most of these cases the expenses ought not to be eventually borne by the proprietors of the cargo alone, but that they should be afterwards apportioned on the whole interest at risk; (the whole being benefitted by the

release ;) and thus be made a subject of general contribution.

Other subjects of average contribution may occur, such as,—LOSS OF EXCHANGE on bills, passed by the master on his owner for the disbursements, on putting into a foreign port in distress; MARITIME INTEREST on bottomry-bonds (1) obliged to be given under similar circumstances; INTEREST ON ADVANCES (2);—and in general, it may be said, that ALL EXTRAORDINARY CHARGES proceeding from en-

(1) Before this charge is admitted in a claim for general average, it should be clearly shown that the transaction is *bona fide*, and that the bond was not merely given as a collateral security for payment of the bills on the owner, as it is often done. Also, in case of the subsequent loss of the ship, it should be noticed that the sum for which the bottomry-bond is given ought to be deducted from the average charges,—that is, if the whole sum was raised on bottomry, there is no claim for average at all; and of course there is no claim for the maritime interest, for the lender runs the risk on that as well as on the principal.

(2) The merchant who advances money for average charges in a foreign country often makes a charge of interest if the vessel remains long in port, which must be apportioned on the average charges. Underwriters have objected to this, on the ground that they are not liable to pay interest; but this is erroneous. For when it is said that underwriters are not liable for interest it is only meant to extend to interest on claims on policies.

deavours to preserve the ship and cargo, and the damage or the loss resulting from the mea-

\* Wesk. p. 252. sures taken for that purpose\*, are fit subjects for contribution.

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The ancient laws prescribe certain forms to be gone through when it is necessary for the general preservation, either to jettison part of the cargo or sacrifice part of the ship, &c. ; but these rules have been seldom strictly adhered to—and when they have, they have only served to induce a supposition of fraud. Targa, a magistrate at Genoa, (the author of *Ponderazione sopra la Contrattazione Maritima*,) says that during sixty years of his practice he had known only five cases of *regular* jettison, all of which were suspected of fraud, because the forms had been *too well* observed \*.

\* Emerigon,  
tom. i. p. 605.

The general principle to be adhered to by the master is, to consult the most experienced of the crew and the supercargo (if there be one on board)—and to make as minute an entry in the journal or log-book as the nature of the case may require ; and immediately on his arrival in port to note, and as soon after as possible extend his protest ;—for it is not only proper that he should

enter his protest on arrival, but he should extend it also whilst the occurrences of the voyage are fresh in his memory.

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*Article 2. Of those Claims for General Average which are DISPUTED or DOUBTFUL.*

[a.] (1) The first question is one of great importance to be determined;—it is that of a ship purposely run ashore to prevent her foundering at sea or driving on the rocks, and which is afterwards got off with damage and arrives at her port of destination. The question is,—*Whether the repairs of the damage sustained by the Ship, are a fit subject for General Contribution?*

The foreign ordinances include this case under the head of general average; for in those ordinances where the specific case is not mentioned it is implied<sup>b</sup>. They derive it from the Rhodian law<sup>c</sup>, according to the literal meaning

(1) For the reason why these claims are marked with a letter instead of a figure, see the preface to the second edition.

(2) The sections ix. x. xi. of the ordinance of Königs-  
burg are recommended to the perusal of the lawyers; as they may probably throw some light on the lately litigated

Vide Ord.  
France.  
• *Leg. Rhod.*  
3. 5. 1.  
Ord. Ant. § 4.  
Ord. Königsb.  
(2)c. viii. art. 7.  
Ord. Copen.  
art. "Av." § 5.  
Select cases of  
Eo. p. 58.  
Marsh. p. 542.

of the maxim before quoted—*Nemo debet locupletari aliena jactura*. But this maxim, as has been before observed, must not be construed literally. On the article in the ordinance of Copenhagen, Magens remarks, “The meaning here seems to be, that if a leaky or sinking ship voluntarily and deliberately be run ashore to save the lives and goods, the damages received under water shall come into a gross average; which (he adds) is a reasonable and nice distinction.” The *Consolato del Mare* and Roccus, say,—that if to avoid a total loss, the captain and crew should judge it proper to run the ship ashore, the damage thereby occasioned, whether to ship or cargo, will be a gross average. Weskett merely states the case, and gives no opinion himself on the subject, but there is no doubt that he was favourable to it, as Magens also was. It appears (from manuscript statements in my possession,) to have been the practice of Lloyd’s in the time of Weskett.

<sup>d</sup> 2 Magens, p. 332.  
<sup>e</sup> *Il. Cons. del Mar.* c. 192, 193. Roccus, *De nav. not. lx.* n. 164.

<sup>f</sup> Weskett, art. “*Gen. Av.*” p. 252.

With these authorities before us, (1) we may subject, of the extent of the ports of Pillau and Königsburg. The author does not recollect that this ordinance was once alluded to during the pleadings in these causes.

(1) “The ordinances of other countries are not, it is true, in force in England; but they are of *authority*, at least, as expressing the usage of other countries upon a

perhaps be thought hasty in immediately rejecting this doctrine as unreasonable and unfounded; particularly when some of our best-informed lawyers are also favourable to it. (1) The writers of the present day say nothing conclusive, unless what Mr. Serjeant Marshall says, under the head of "loss by perils of the sea," be deemed so. After speaking of a *voluntary* stranding of the ship, he says, "A stranding may be followed by a shipwreck, in which case it becomes a total loss; or the ship may be got off in a condition to prosecute her voyage, and then the *damage sustained*, and the expenses incurred, will be only a partial loss of the nature of a general average."

In the absence of modern authority, we have only argument against it; but this is strong.

contract which is presumed to be governed by general rules, that are understood to constitute a branch of public law."

"In matters of insurance, and shipping," it is said<sup>h</sup>, "judgment is to be given according to the maritime laws and ordinances, and according to the customs observed amongst sea-faring people"—("Et maris consuetudines sunt servandæ."

<sup>h</sup> Marshall, p. 20

<sup>h</sup> Roccus de  
Assc. Not.  
lxxx. n. 309,  
310. Vide  
Stracca. de  
Mercat. tit.  
"De Nav."  
n. 24.

(1) Two cases of this nature occurred a year or two since, and the opinions of two of the most eminent practitioners at the bar were separately had on them; from which it appeared, that *they* had no hesitation in considering them as cases of general average claim.

The foundation of all claims for a general contribution is jettison of the cargo; the rules therefore which govern in enforcing this well-known law, should be applicable to all other cases of general average claim. If we examine the above case, we shall find that it has nothing in it in common with a jettison:—For, *first*,—a jettison takes place, in consequence of “a voluntary and deliberate determination<sup>1</sup>,” and, *secondly*,—a particular thing is selected to be sacrificed for the general safety.—In the case before us, however, there is no time for meditation; there is no specific *thing* selected to be given up to save the remainder;—there is indeed *no alternative*. For, whatever may be assumed after the ship is in a place of safety,—in every case of this kind, it is for the preservation of life, that this act is resorted to, and not for that of the ship and cargo; and of this, those who have been in similar situations are aware;—the result may be beneficial, but should not the *intention* determine the nature of the claim? Put the extreme case, of a ship in a storm finding herself completely surrounded by breakers, and every instant expecting to be dashed to pieces;—in this most perilous situation the master and crew think it prudent, instead of suffering the wind and the waves to *drive* her,—themselves to *run her* upon

<sup>1</sup> Vide supra, a.t. 1. [1.] & authorities cited.



the rocks.—The ship fortunately holds together, the weather moderates, and she is got off into smooth water.—Now, what is there in this case that will apply to that of a jettison?—Only this,—the ship was “in distress.” But we look in vain for the other requisites:—“the mind, and agency of man,” were not employed,—nor was there, in any sense of the word, a “voluntary and deliberate” selection of “a particular thing” to be sacrificed for the general safety<sup>k</sup>. <sup>k</sup> Vide *supra*, c. 1. § 1. Therefore of all the necessary requisites for a general average contribution, there is only one:—“the distress of the ship.”

The dispute here is between custom and argument. There is no doubt that custom ought to prevail when reason and experience combine to show the propriety of it; but it has been justly remarked, that “custom ought to have no weight when inconsistent with equity<sup>l</sup>.” In this case it appears to be inconsistent with equity that the whole should contribute in restitution of what was *not intentionally* sacrificed for the benefit of the whole. <sup>l</sup> Shuback, *De jure litloris*, p. 194. <sup>m</sup> Kaimes’ *Pr. Eq.* B. 1. p. 1. c. 3. § 2.

It appears to come under the head of those losses which are *inevitable*;—and such, the *Digest* and all authors are agreed, must be borne by the parties themselves separately<sup>m</sup>. For you cannot in equity convert a loss, which is inevita- <sup>n</sup> *Leg. Rhod.* l. 2. § 1. l. 5. <sup>o</sup> *Ord. Ph.* 11. art. 8. & 9. <sup>p</sup> *Q. v. Weytsen*, p. 6.

ble, into a *claim* for the preservation of property.

[b.] *The second disputed or doubtful case to be noticed is that of RUNNING A SHIP ON SHORE WHEN CHASED BY THE ENEMY*<sup>a</sup>.

<sup>a</sup> *Leg. Rhod.* 3.  
*Leg. Wisb.* 55.  
*Poth. C. d. L.*  
p. ii. § 2. n. 150.  
*Auth.* ut sup.

This case differs in principle very little from the preceding. If therefore the arguments are good against the one, it is conceived they must be so against the other.—In both there is wanting the motive. In neither case is there any thing selected to be sacrificed.—In neither case can it be said that the master and crew did that for the preservation of the *ship* and *cargo*, when, strictly speaking, the object was so much higher—the preservation of life (1) or liberty. The learned Pothier, however, after enumerating other species of average, says ;—“ besides these species of general average there is another, viz.—when a ship being chased by an enemy, the master in order to prevent her capture runs her

(1) If the law determine, as it probably would, that the damage incurred by whatever is done by the captain and crew for the preservation of *life*, is to be made good by a general average contribution,—then these two last cases of [a.] and [b.] are legitimate general average claims.—But if argument alone should be allowed to settle the point, then perhaps there will be little difficulty in determining that they are not.

ashore,—the damage caused is a general average, whether it happen to the ship or the cargo°, the running ashore having been made for the general safety”<sup>p</sup>. Both these cases will require great consideration before they are admitted under the head of undisputed general average claims.

• Vide Appendix i.

• Poth. Contr. de Lou. ut supra.

[c.] *The DAMAGE DONE TO A SHIP by defending her against an enemy, and the AMMUNITION EXPENDED thereby*°.

The first article mentioned by Weskett<sup>1</sup>, (which he got from the laws of Hamburg<sup>2</sup>), as coming under the head of general average, is “the damage that a ship suffers in her apparel and cargo in defending her against an enemy;” and this is confirmed by the foreign ordinances, which made every thing that *ultimately* contributed to the general benefit, a subject of general contribution; and yet, on examination, we shall not find one feature in this of a general average claim,—i. e. if by it be meant a deliberate sacrifice for the general benefit. In both these cases a distinction should be made between an “armed ship” so called,—and an ordinary merchantman sailing with convoy. The former being bound, by a kind of implied warranty, to defend herself—the damage done to her and the ammunition expended ought to be considered as the wear

<sup>1</sup> Ord. Hamb. tit. xxi. § 9. 5.  
<sup>2</sup> Ord. France, art. 6. “des Av.” Pothier, C. d. L. n. 143.  
 Ord. Hanse T. art. 35.  
 Weskett, 252.  
 art. “Gen. Av.”  
 Ord. Hamb. ut sup.

and tear of the voyage. But the case is different in an ordinary merchantman ; though in such a case it ought not to come under the head of general average, but if any claim be made it should be for a partial loss. There may be some doubt whether in either case the ammunition expended be a proper subject for general or particular claim ; but if the ship escape perhaps it should be general.

[d.] THE EXPENSE OF CURING THE HURTS  
*which the officers and seamen may receive in  
defending the ship.* (1)

<sup>11 & 12 Will.</sup>  
III. c. vii.

Provision is made for this case by statute<sup>1</sup>; whereby the judge of the Admiralty court is authorized on petition, to direct the registrar and merchants, to levy a certain sum, not exceeding two pounds *per centum* of the value of the ship, freight, and cargo ; (according to the first cost of the latter,) and distribute the same

<sup>4 Camp. Rep.</sup>  
p. 337.

(1) Since this was published it has been determined, that neither the damage done to a merchant-ship by defending her against a privateer, nor the value of the ammunition expended, nor *the charge of curing the wounded seamen*, are subjects of general average contribution<sup>2</sup>. The Statute of William III, above cited seems to have fallen into disuse, for the judge did not allude to it on this trial, nor does the author know of any late instance where it has been enforced.

amongst the wounded seamen and the widows of the slain, &c.

It is seldom that there is any necessity to bring these claims before the Admiralty court. No authority is necessary to oblige the underwriters to do that which they are always prompt to do of their own accord, viz.—to remunerate those who have suffered in bravely defending the property entrusted to their charge.

[e.] *The WAGES and PROVISIONS of the ship's company.*

Some writers hold, that there are cases where the above should be made good by a general contribution ;—these are said to be as follow :—

1. From the time when in distress, the ship alters her course to seek a place of safety to refit, and until she is refitted and pursues her voyage \*.

2. While detained in port in consequence of unjust capture or seizure \*.

3. While under embargo or detention by the authority of the state, either in the port of loading, or in an intermediate port \*. The practice in foreign countries

is, in almost all these cases to make the wages and maintenance of the crew a general average charge. The case alone of *embargo* appears to have had the full consideration of our courts ;—

\* Beawes, *Lex merc. rediv.*

p. 166, and foreign ordinances.

\* *Idem.* 1 Mag. p. 67.

Ord. France, lib. iii. tit. 7.

\* *Des av.* &c. Ord. France,

ut sup.

<sup>1</sup> 2 Term Rep.  
p. 407.

in that case, Mr. Justice Buller said<sup>1</sup>, “these charges shall fall upon the owners only, and the freight must bear them;” meaning, I suppose, that the ship-owners must reimburse themselves out of the profits of the voyage. The French

<sup>2</sup> Ord. France,  
ut sup.  
Emer. tom. 1.  
p. 631.

ordinance says<sup>2</sup>, the food and wages of seamen belonging to a ship embargoed by an order of state, shall be reputed gross average, if she be hired by the month, but if she be freighted for the voyage, they shall be borne by her alone.”

<sup>3</sup> Beawes, *Lex*  
*merc.* p. 166.  
Vile Ricard,  
*Neg. d'Amst.*

And it is further said<sup>3</sup>, that when the crew are hired by the month, the same rule should hold good: but it seldom happens that the crew are hired by the month—they are paid at the rate of so much per month, but they are hired for or by the voyage. The reason given why victuals and wages are general average when the ship is hired by the month is—that the master not receiving in this case any freight while the arrest lasts, is not obliged to furnish for nothing his sailors to take care of the merchants’

<sup>4</sup> Pothier, *C. de* goods<sup>b</sup>.  
*L.* p. ii. § 2.  
n. 151.

*Adrian Verwer*, (an old writer on insurance) in examining the question of seamen’s wages, &c. on a ship detained at Vera Cruz; says, very sensibly,—“why should victuals and men’s wages be deemed a general average any more than the

interest of money, and the damage caused to the cargo by the delay<sup>c</sup>." (1)

<sup>c</sup> Magens, p. 68.

It may here be noticed, that cases have occurred where a master of a ship, being aware that seamen's wages would not be allowed on a vessel putting into a port in distress, has on arrival discharged his crew, and then hired them again and charged for their services as labourers in discharging and reloading the ship, rigging her, &c.—It may be proper to inform such persons that this artifice will not avail them—because the owner is bound, at his own peril and at his own expense, to keep a competent crew on board from the commencement to the termination of the voyage. It would seem that the duties of a ship-owner are not in general so well understood as they ought to be.

[f.] THE REPAIRS DONE TO A SHIP *in a foreign port where she puts in in distress, in order to enable her to complete her voyage*<sup>d</sup>.

<sup>d</sup> 2 Term. Rep. p. 407.

It is surprising that any discussion should

(1) The same author (in his treatise of the Marine Laws of the Low Countries) states a case where the wages and provisions were made good by a general contribution:—as, where a ship was taken by force and carried into a port, and the crew remained on board for the express purpose of reclaiming the ship, and by that means prevented a total loss<sup>e</sup>.

<sup>e</sup> *Lex Merc. rediv.* p. 150; and vide Bynkershoek *Quest. jur. priv. lib. iv. c. 25.*

have taken place on this subject, or that there could ever have been any doubt that the owner of the ship was bound to keep his ship in repair. The idea could only have originated in the supposition that what was *eventually* for the general good, *i. e.* in this case the arrival of the ship with her cargo, should be borne by a general contribution (1).

[g.] A SUM PROMISED BY THE MASTER *to be given to seamen for their exertions while the ship is in distress.*

An action for this cannot be maintained;—for a seaman who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and therefore a pro-

<sup>1</sup> 4 M. & Sel.  
Rep. p. 141.

(1) Since the first edition of this Essay it has been determined by the judgment of the court of king's bench, that the following charges are not general average according to the law of England, viz.—1. *The wages and provisions of the crew*, while a ship remained in port, whither she was compelled to go for the safety of the ship and cargo in order to repair a damage occasioned by a tempest. 2. *The wages, &c.* while detained in port by adverse winds, whither she returned after having repaired her damages. 3. *The expenses of the repair*, though evidently to put the ship forward on her voyage. 4. *The damage done to ship and tackle* by standing out to sea with a press of sail in tempestuous weather, though such press of sail was necessary for that purpose in order to avoid an impending peril of being driven on shore and stranded.



mise made by the master when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, was held by Lord Kenyon to be void<sup>s</sup>.

<sup>s</sup> Peake's N. P. Cases, p. 72.  
Abbott, p. iv.  
ch. 1. § 8.

[h.] DAMAGE DONE TO THE CARGO *by the means of water thrown down the hatches to extinguish an accidental fire in the hold or between the decks.*

The question is, who is to pay this loss?—The underwriter on the goods refuses, on the ground that though he is liable for loss by fire generally, yet in this case, it is the *remote* cause of the damage, *water* is the *proximate* cause, but this is by the hand of man, and therefore it does not come under the head of a “loss or misfortune” for which he is liable. When claimed as a general average, it is objected to on the ground that the damage done to the goods is *secondary* and *accidental*, and not *primary* and *intentional*, (as in cutting away a mast, &c.) which it ought to be to establish such a claim. The question therefore remains,—how is the proprietor of the damaged goods to get his indemnity? In answer to this, it is submitted, that as there should never be “a wrong without a remedy,” and as “no one should be allowed to profit by another's loss,” the proprietor has a

right to demand of those who *have* profited by his loss to give him the remedy which he cannot get from his underwriters,—and that therefore this claim should be settled by a general average contribution.

## SECT. II.

### OF THE APPORTIONMENT OF GENERAL AVERAGE.

Having thus treated as fully as the nature of this Essay will admit, of the subject-matter for general average contribution, I proceed to make a few remarks on the Contributory Interest,—the Valuation of the same,—and the Apportionment of the Loss.

<sup>b</sup> Abbott, p. iii.  
c. 8. § 1.

A learned and very useful writer says<sup>b</sup>, “there is no principle of maritime law that has been followed by more variations in practice than this;” and that “the determinations of English courts of justice furnish less of authority on this subject than on any other branch of maritime law (1).” As the law, therefore, does not guide

(1) Sir William Scott says, “The law of cases of necessity is not likely to be well furnished with precise rules;

us in these cases, it is essentially necessary that some general principles should be laid down, and be acted upon by persons so much interested in the result as the subscribers to Lloyd's.

That the *ship* itself, and the *cargo* on board, (if of any value) should contribute<sup>1</sup>, appears to be indisputable (1); but the cases in which the *freight* should be brought into contribution, are not so well known nor so satisfactorily settled<sup>2</sup>.

<sup>1</sup> *Leg. Rhod.*  
art. 2. § 2.  
*Emerigon*,  
c. xii. § 43.  
*Pothier, C. de L.*  
p. 2. § 1. art. 3.

<sup>2</sup> *Ut. inf. Art. 3.*

### Article 1. Of the Cargo.

It is the general rule, that "what pays no freight pays no average"<sup>1</sup>;—and therefore wear-

<sup>1</sup> *1 Mag. p. 62.*

necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases is likewise *legal*. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects<sup>2</sup>."

<sup>2</sup> *3 Rob. Adm.*  
*Rep. p. 266.*

(1) In the case of ships taken up by the East India Company there is an exception to this general rule.—For according to the terms of the charter-party, the cargo belonging to the company is not liable to contribute to general average. It is customary to provide for this in policies on ship, and freight, and private trade. In a late case, however, it appeared that the company, acting with that principle which always characterizes British merchants, did think themselves liable, though they were perhaps not strictly bound to contribute, their proportion

ing apparel, jewels, passengers' property (1), seamen's wages, &c. do not contribute to general

\* Ord. Antwerp.  
Molloy, *De jure*  
Mar. c. 6, § 4.  
Weeskett, p. 257.  
Emer. ut sup.  
\* Molloy, ib.

average". But it is said, specie must pay average according to its full value, in the same manner as other merchandise\*, and there is no doubt of the propriety of this when specie is laden on board on freight,—but otherwise there is no authority for money paying average. This is by the old writers left amongst the unsettled questions, and is to be determined according to them, by the judgment of persons acquainted with these affairs\*. The above rule, however, that "what pays no freight pays no average," should not be construed literally, for it would be very unjust that the master, or owner, or any other person who had goods on board, should not contribute, merely because he paid no freight for the carriage of them. All the goods on board ought to contribute\*,—and the goods are,—“the wares, or cargo for sale laden on board the ship”, whether it pay freight or not.

\* Q. v. Weyt.  
p. 13.  
Ord. Wisb.  
art. 38.  
Stracc, *de Nav.*  
n. 25.  
Mornac. Obs.  
*ad leg. Rhod.*  
l. 2.

\* Leg. Rhod.  
art. 2. § 2.  
1 Mag. p. 62.  
1 Emerigon,  
p. 639.  
Abbott, p. iii.  
c. 8, § 14.  
\* Lord Ellen-  
borough,  
8 East's Rep.  
p. 375.

(in common with the ship, freight, and private trade) towards the loss of their cargo which was jettisoned.

(1) The ordinance of France in conformity to the *Digest*\*, makes the passengers contribute for their property, jewels, &c.

\* Leg. Rhod.  
ut sup.  
Poth. *Contr. de*  
Lou. n. 125.

Some of the foreign ordinances say, speaking of jettison, (which as before remarked is the best illustration of general average loss,) if the loss occur *before* half the voyage be performed, the goods shall be valued at the invoice cost;—if *after*, at the neat proceeds on arrival<sup>†</sup>. And <sup>† *Consol. del Mar. c. 95.*</sup> this it is said was formerly the custom in <sup>Stat. Genoa, l. 4. c. 17.</sup> England<sup>‡</sup>. This principle is derived from the <sup>Ord. Rott. n. 117.</sup> Rhodian law; which ordained that the goods <sup>Stock, art. v. § 2.</sup> jettisoned should be reckoned at the first cost—<sup>Copen. art. xi. † *Malyne, c. 26,*</sup> and those which were saved at the market <sup>Molloy, *De jure Mar. b. 2. c. 2. s. 6.*</sup> price on arrival<sup>‡</sup>. The ordinance of Ham- <sup>Wellwood, tit. 21.</sup> burgh<sup>‡</sup>, (of 1731) differs from all others; it <sup>‡ *Leg. Rhod. art. 2. § 4.*</sup> states, the goods saved and lost shall be esti- <sup>‡ *Tit. xxi. art. 2.*</sup> mated according to the invoice with all charges, except premium of insurance. Thus making no distinction between half the voyage being performed—or the average happening at the commencement of it—but in all cases regulating the sum to contribute, and that to be paid in restitution, at the invoice cost.

Every nautical man is aware of the difficulty, and of the impossibility in some cases, of determining with precision where the one half of the voyage ends, and consequently, where the other half begins;—this must therefore have been a prolific source of dispute and litigation. The authority which we have for this doctrine, leads

us to endeavour to discover how it originated;—and this, it is imagined, may have been in the apparent impropriety of making *every case* subservient to the general rule, of valuing the jettison, and the cargo for contribution either at the invoice cost, or at the market price at the port of discharge (1).

But perhaps it might not have been intended that this rule should be acted upon strictly; and the spirit of it may be reconciled even with the practice of the present day, if we substitute the *commencement* of the voyage for the first half. Thus, let us put the case of a ship bound from London to the West Indies, which incurs a general average loss, by cutting from her anchors in the Downs, and is afterwards carried into Ramsgate in distress;—here the cost of the anchors and cables, the salvage charges, &c. are the subject of a general contribution, and the average is settled (or ought to be settled) in

\* Kaimes' *Pr.*  
*Eq. b. 1. p. 1.*  
*c. 3. § 2.*

† Millar's *El.*  
*p. 345.*

‡ Abbott, *p. iii.*  
*a. 3. § 14.*

(1) It has been contended\* in case of *jettison*, that the goods saved ought to contribute according to their *weight* instead of their value. But this is founded on the assumption that the losing party is entitled to a *recompense*,—when in fact he only claims *restitution*, as far as his loss has been converted to another's gain†. For contribution is made not on account of incumbrance to the ship, but of safety obtained‡.

London. In this case, the value of the cargo for contribution is, the cost of the goods on board, (without insurance) *i. e.* the amount of the tradesmen's bills and the shipping charges, which is the value at risk,—because in case of jettison the goods might have been replaced at that sum.

When the average is adjusted at the port of discharge, the universal practice now is, to take the actual value of the cargo at the market price, stripped of all the charges attaching to it,—as freight, duty and landing charges<sup>a</sup> (1); —and if a jettison has taken place, then the estimated neat proceeds of the goods jettisoned, taken in the like manner, should be added to the neat value of the cargo saved<sup>b</sup>.—For equity requires, that the party whose loss has procured the arrival of the ship, should be put in the same situation with those whose property has

(1) The value to contribute, is the neat value to the consignee when he gets the goods into his possession;—therefore the charges are only the freight duty and landing charges.—Not the *insurance*, for that is a charge of the shipper or seller at the commencement of the voyage, and is also optional;—nor the *commission*, for that is incurred after the landing and sale of the goods; and a sale is not essentially necessary in this case. No man can oblige another to dispose of his property, merely because a general average has been incurred.

<sup>a</sup> *Leg. Wisb.*  
art. 39.  
Ord. Ph. ii. art.  
6. tit. "*des dom.*  
*d. Vas.*"  
Old Stat. Hamb.  
p. ii. tit. xvi.  
art. 2.  
Ord. France,  
"*du jet.*" art. vi.  
Ord. Konigs.  
n. 37.  
Q. v. Weyt. p. 12.  
Malyne, c. 25.  
2 Val. Com. 297.  
Emer. xii. § 43.  
Poth. n. 131,  
123, 128.  
<sup>b</sup> *Leg. Rh.* l. 2.  
§ 2. 4.  
Q. v. Weyt.  
p. 27.  
Val. Com.  
ut sup.  
Grotius d'intro.  
*Jur. Holl.* c. 29.  
Pec. ad *Leg. Rh.*  
n. 196.  
Ord. Rott. 116.  
Emer. & Poth.  
ut sup.  
Magens, p. 69.

\* Poth. ut sup.  
Abbott, p. lii.  
c. 8. § 15.

arrived;—and which can only be done by considering his goods to have arrived also\*. If the goods saved be damaged by some accident after the jettison, they must be taken at their deteriorated value; for the value of what arrives is the value of what is saved: but if goods be damaged by the jettison, they must be taken at their value as if sound, because the damage should be made good to the merchant by con-

\* Poth. C. de L. tribution<sup>d</sup>.

n. 132; & vide  
supra p. 14.

art. [11.]

\* Ord. Fr. art. 8.

It was the custom in France, according to the ordinance<sup>e</sup>, to survey the goods saved of the same quality as those jettisoned, and to produce the bills of lading and invoices of the whole, to show that the sum to contribute was not undervalued,—and that the sum to be paid in restitution, was not greater than the loss<sup>f</sup>.

<sup>f</sup> Poth. ut sup.

If the cargo produce nothing, or if the charges be greater than the gross produce,—then it should contribute nothing,—as a person is required to pay only in proportion to the benefit received.—If the cargo had not arrived the charges would not have been incurred;—but having arrived there are no proceeds, and therefore there was nothing at risk, as regarded the merchant. It is on the same equitable principle, that if goods be abandoned to those who save them, there can be no claim for salvage;



for salvage can never exceed the benefit procured by it<sup>c</sup>.

<sup>c</sup> Kaimes' Pr.  
Eq. b. iii. c. 8.  
§ 5.

The most unexceptionable mode of settlement, as being the least likely to create dispute, is to adjust the average claim after the ship has arrived at her port of discharge; the next best mode is, to settle it at the port of loading; an *adjustment at an intermediate port* ought always to be avoided. By an intermediate port is meant, any *foreign* port where the ship may put in in distress.

If the ship be lost short of her port of destination, and the cargo be saved and sent on,—then the *freight* (which is in the cargo) must contribute its proportion to the charges of salvage<sup>h</sup>.

<sup>h</sup> Pr. Eq. b. 1.  
p. 1. c. 3. § 2.  
art. 2.

It has been already observed, that it is only the proprietors of the cargo under the deck, who can demand contribution in case of jettison; but the value of the goods on the deck must, according to equity, be brought into the apportionment, if saved. It is very improbable however that these goods would be saved if any part of the cargo was jettisoned.

When the average is adjusted at the port of loading, and the freight has been paid there, the practice is, to add it to the value of the cargo; in the same manner as any other charge incurred

on the goods before putting them on board the ship. For the merchant has then an interest in the freight, by its being converted into a charge on his goods.

It is often asked whether the master can refuse to deliver the goods to the merchant until he is satisfied for the general average. This is so well answered by Pothier<sup>l</sup>, that I cannot do better than quote his words—"Goods cannot be retained on board for freight, and contribution ought not to have a greater privilege than freight. But though the master cannot retain the goods, he may seize them on the quay until security is given<sup>k</sup>. Nevertheless it is customary if the merchant be in good credit to deliver the goods,—and this being the custom, the master is not liable for his insolvency." This is also the custom with us; but the master may if he choose, insist upon the consignees entering into an average bond. Such an instrument is however of little use, (unless the names of arbitrators be inserted,) for the consignees by this measure only bind themselves to pay what they are bound by law to pay without it.

<sup>l</sup> *Con. d. L.*  
p. ii. § 1. art. 4.  
n. 134.

<sup>k</sup> *Ord. France,*  
tit. "*Du Jet*,"  
art. 21.

### *Article 2. Of the Ship.*

What the value of the ship is that should contribute to make good a general average loss, de-

mands a little consideration. Some foreign laws and ordinances direct that the ship shall contribute for half her value<sup>1</sup>;—others that it shall be her full value which shall contribute<sup>m</sup>;—others again, that the owner of the ship shall contribute for her whole value, *or* her whole freight at the option of the proprietors of the cargo<sup>n</sup>—and this was the custom in Holland from time immemorial<sup>o</sup>;—but the laws of Oleron<sup>p</sup> give the option to the owner. The difference in all these laws and ordinances is easily reconciled, for they all proceed on the same grounds, viz.—the impossibility of employing a ship in any voyage without wear and tear and a consumption of provisions and stores, and consequently losing part of the value that she had when she commenced the voyage<sup>q</sup>.

<sup>1</sup> *Con. del M.*  
c. 94.  
Ord. Florence.  
— Amsterdam  
— France.  
Vide Pothier,  
n. 119. on art. 7.  
<sup>m</sup> Ord. Philip II.  
Ord. Bilbao.  
— Genoa.  
— Konigs.  
— Hamb.  
— Copen.  
— Portugal.  
<sup>n</sup> *Leg. Wisb.*  
Ord. Antw.  
— Rott.  
<sup>o</sup> Ad. Verwer,  
annot. p. 118.  
<sup>p</sup> *Leg. Oler.* 8.

<sup>q</sup> 1 Mag. p. 58.

Q. van Weytsen, who is always judicious, says, after discussing the subject;—"nevertheless they ought in reason and justice to carry in common contribution the whole value of the vessel, as well as the entire freight which the master receives for the voyage<sup>r</sup>." This, which was his opinion in 1563, is *now* the practice in England.

<sup>r</sup> Q. van Weyt.  
*Tr. des Av.*  
p. 31.

Whatever be the nature of the property at risk, it is the value to the owner of it at the time it is saved that should contribute, and not any former nor after value. If, for instance, goods

• Weakett,  
p. 131.

were damaged before they were jettisoned, the proprietor ought not to receive for them the value of sound goods\*; nor ought he to be required to contribute for more than their true value at the time they were saved.—So, if a ship bound to London, after a long and boisterous passage arrive in the Downs in a very damaged state, and should there cut from her anchors, and be carried into Ramsgate in distress; it is evident, that her value must be considerably lessened, not only by the fortuitous damage received and by the actual sacrifice made, but also by the wear and tear of the voyage;—yet it is the custom that the value in the policy, after deducting the amount of the partial loss, is taken as the value for contribution (1);—or, when that is not done, then the value of the ship in her damaged state is taken. For, it is said, “the ship is to be valued at the price she is worth on

(1) Magens says, “the valuation put by a master or owner of a ship in a policy regards only the insurers, and not any other persons concerned, who (in case of general average) ought always to make him contribute more or less according to a just estimate.” But this must mean,—of the value that the ship is to *him*. It is the custom of France to deduct the wear and tear and particular average from the value of the ship when she sailed, before the sum for contribution to general average is ascertained; but provisions and advances to the crew are not, as with us, included in the value.

her arrival at her port of delivery.” Neither of these modes however appears to be satisfactory. Marsh. p. 545.

—In respect to the former;—when the average loss occurred, the ship was not worth so much, (besides the partial loss,) by the *wear and tear* of the voyage, as when she set sail: and as to the latter mode,—it is admitted on all hands, that the party whose property has been sacrificed, and who is indemnified, should contribute his proportion to make good the loss,—the sacrifice having been proportionally beneficial to him; otherwise indeed, he would be the only person who would not be a loser. On the *first* principle the ship contributes too much;—on the *second* too little.

The true value of the ship for contribution, is the amount that her hull, masts, yards, sails, rigging, and stores would produce after the sacrifice is made,—with the addition of the amount made good by the general average contribution.

There is no general rule, however, that will serve for all cases of this nature; for even on the above principle, if the voyage end at a foreign port, or at a place where there is no demand for shipping; or on the contrary, where there is a very great demand; the value of the ship will be decreased or increased by

such adventitious circumstances, but which ought to have no weight in an equitable apportionment.

That mode, in fact, appears to be the best which approximates the nearest to the value of the ship when she sailed, after deducting the provisions and stores expended,—the wear and tear of the voyage,—and any partial loss by sea-damage incurred, up to the time when the general average loss took place (1); for that is

(1) The following *formula* will illustrate the above principle of taking the value of the ship for contribution—*ex. gr.*

1. Value of the ship at the outset.....	£1000.
Deduct partial loss.....	£50.
—— provisions and wear and tear....	50.
	<u>100.</u>
Value to contribute.....	<u>£900.</u>
Or 2. Value of the ship in her deteriorated state . . .	800.
Add made good by general contribution . . . . .	100.
	<u>£900.</u>

That principle appears to be the most correct by which these two modes can be made to agree. From a mass of manuscript adjustments, (made within the last thirty years,) now before me, I find that in scarcely any instance has the amount made good to the ship by general contribution, been added to the value of the vessel in her deteriorated state on arrival. If the value were taken after she was repaired it would be incorrect, by so much as the

her worth to the owner. And it is upon this principle that some foreign ordinances, as before mentioned, deduct a half, from the value of the ship at the commencement of the voyage.

### *Article 3. Of the Freight.*

As in the value of the ship so also in the value of the freight to be brought into contribution—the foreign authorities are not agreed.

amount of the wear and tear, &c. of the voyage to that time, which it is presumed would be replaced by the repairs. There is however, still a question on this subject:—for as the voyage proceeds the value of the ship necessarily decreases, and the relative value of the freight increases:—therefore what the ship-owner loses of his ship by the wear and tear of the voyage, it may be imagined he gains by the probability of earning his freight. But the freight always contributes in full, (except the wages,)—though the above may have given rise to the erroneous practice of deducting the provisions also, which are part of the outfit of the ship, from the amount of the freight<sup>u</sup>.

<sup>u</sup> Vide *Infra*,  
Art. 3.

It may be remarked, in confirmation of the principle of taking the value of the ship at what she was worth when she sailed on her voyage, &c. (as *per* first example,) that a ship-owner sends his ship to sea intending to have her brought back again: he does not send her abroad, as a merchant does a bale of goods to be sold on arrival. The sum, therefore, which the ship-owner has at risk, is the value of the ship in her own port, and not any fictitious value.

\* Ord. France. Some direct \* that only half the freight shall  
 — Amst. contribute;—others\* the whole; (after deducting  
 Custom of Lis- the wages;)—one, the ordinance of Florence,  
 bon. (1). states one-third; and according to others, it has  
 w Il Con. del been seen, that it is optional with the proprietors  
 Mar. c. 96. of the cargo\*,—or with the owner of the ship\*,  
 Ord. Ph. II. whether the full value of the ship *or* of the  
 — Genoa. freight shall contribute.  
 — Konigs.  
 — Hamb.  
 — Copen.  
 \* Leg. Wisb.  
 Ord. Antw.  
 — Rott.  
 Ad. Verw.  
 annot. p. 116.  
 \* Leg. Oler. 8.

When the average is adjusted after the ship's arrival, and the freight is payable at the port of discharge, there can be no doubt that it should make part of the contributory interest; nor is there any when the average is settled at the loading port,—if the freight, or whatever other name it may be called by, be paid in advance; for it then, being a charge on the invoice, becomes part of the value of the cargo\*:—but when the payment of the freight depends on the contingency of arrival, the ship being a general one—not chartered for the voyage,—it is thought by some, that the ship and cargo should alone contribute, provisionally,—they being the only real property at stake; for in case of the ship being lost on the voyage, she would have earned no freight. It is held however, that the

\* Vide sup.  
8. 2. Art. 1.

(1) This is stated to be the *custom* of Lisbon, because the author has not yet been able to obtain a copy of the marine laws or ordinances of Portugal.



value of the freight must contribute in the case of re-capture,—(which is similar to a general average loss,) if it were in the course of being earned at the time<sup>a</sup> (1).

<sup>a</sup> 1 Edwards' *Adm. Rep.* p. 223.

On a ship being *chartered* for the voyage, and the average being settled at the port of loading, it is the custom in Lloyd's to make the freight contribute to the general average;—and the learned judge of the Admiralty court has decreed salvage to be due upon the whole freight, where the ship went out upon a charter-party for the voyage out and home<sup>b</sup>.—This is confirmed by the judgment of the Court of King's Bench;—where the whole freight of an East India ship chartered out and home, was adjudged to contribute to a general average, which happened on the voyage out<sup>c</sup>.

<sup>b</sup> 1 Ed. *Adm. Rep.* p. 224.

Owners of ships, when the cargo is loaded on their own account, and they have not insured the freight, have contended that the *ship* and *cargo*, (or rather the underwriters on them,) ought to pay the whole of the general average. But this is erroneous;—in the value of every

<sup>c</sup> 1 Maule & Selwyn's *Rep.* p. 318.

(1) In a former case of re-capture where the freight was made to contribute<sup>d</sup>, Sir William Scott qualified his judgment by saying;—"If a commencement has taken place, and the voyage is afterwards accomplished, the whole freight is included in the valuation of the property on which salvage is given."

<sup>d</sup> 6 Rob. *Adm. Rep.* p. 90.

cargo the freight is a component part;—the freight has been earned—if not, it might as well be contended that no *wages* were due, as freight is significantly called “the mother of wages,”—but the fact is that whether the cargo come to a gaining or a losing market, the freight is always in it.

Wherever the average is adjusted, the wages of the seamen must be deducted from the amount of the freight, and the neat sum is the value for contribution<sup>c</sup>. But it is the wages due at the termination of the voyage; and therefore any advance of wages, which is allowed to be included in the value of the ship (and to be insured as part of her outfit<sup>d</sup>), is not to be deducted.

<sup>a</sup> *Il Con. del M.*  
c. 281. 293.  
Ord. Genoa,  
Konigsb.  
Hamb.  
Copen.  
France, &c.  
Emer. c. xii.  
§ 42.  
<sup>b</sup> *Poth. C. de L.*  
p. ii. § 1. art. 3.  
<sup>c</sup> *Marsh.* p. 623.

The reasons why seamen's wages should not contribute, are as follow:—*First*,—the wages ought not to be clogged with any charges, that the seamen may the more readily consent to a jettison, or any other sacrifice for the general benefit, from knowing that they will not be sufferers thereby; also that they may not expose themselves too much, and thereby risk the whole<sup>e</sup>; and further, that “having paid by their extraordinary personal services during the peril which gave rise to the jettison, it is but just that they should be allowed this privilege<sup>h</sup>.”

<sup>d</sup> *Poth. C. de L.*  
p. ii. § 1. art. 3.  
n. 126.

*Secondly*,—because seamen's wages are not an insurable interest<sup>i</sup> (1), except as above, where they form part of the outfit;—and *Thirdly*,—because the wages are not due unless the ship arrive in safety<sup>k</sup>.

If, indeed, the full freight were to contribute to the loss, the owner of the ship would, (from freight being considered the mother of wages,) (2) deduct a proportion of the average claim from the wages before he paid the seamen for the voyage.—There is but one instance mentioned by the foreign writers where the seamen's wages contribute to the general average, and that is, in the case of the ransom of the ship<sup>l</sup>.

It is customary to deduct the master's wages also (3);—though the rule which prohibited the

(1) Pothier says, "the reasons why seamen's wages are not insurable are these:—1. Because they are gains to which seamen are not entitled, if the vessel and her cargo perish. 2. For fear that, being insured, they would not use the same care in the preservation of the vessel, in which they would no longer have an interest<sup>m</sup>."

(2) According to Lord Kaimes, the reason why freight is called the mother of wages is—because "if the former be due, the latter must also be due<sup>n</sup>."

(3) It was customary in Holland for the master's wages to contribute equally with the goods preserved;—but this was only when the average was settled at the port of loading, and the goods were valued at the market price<sup>o</sup>.

<sup>i</sup> Ord. Fr. "d'Ass." art. xv. 7 Term Rep. p. 157. 3 Bur. Rep. p. 1912.

1 Mag. p. 13. Park, p. 12. Marsh. p. 90. <sup>k</sup> Poth. C. de L. ut sup. & Cont. d'Ass. ut inf.

<sup>l</sup> Ord. Franco. Emer. ut sup.

<sup>m</sup> Tr. Cont. d'Ass. ch. 1. § 2. art. 1. n. 36. 39.

<sup>n</sup> Pr. Eq. b. i. p. 1. c. 4. § 5.

<sup>o</sup> Bynkershoek, tom. 11. Quest. jur. priv. l. iv. c. 21.

• Marshall,  
p. 831.

insurance of the wages of the mariners did not apply to the captain<sup>1</sup>. The seamen's wages are secured to them on the bottom of the ship; but the master has merely the security of his owners, according to his contract with them. The former can sue in the court of Admiralty—the latter cannot<sup>2</sup>. There may be, therefore, some doubt whether the master's wages should be deducted.

• 2 Rob. Adm.  
Rep. p. 237.

• 1 Magens,  
p. 72.

It is settled, that the seamen's wages should be deducted from the freight;—but it has been made a question by some, whether it should in all cases be the full amount of wages for the voyage: *i. e.* whether the rule shall be the same at whatever part of the voyage the average claim may occur. Magens says<sup>1</sup>, “only so much of the seamen's wages ought to be deducted from the freight as may be due from the time of their beginning to load till their arrival.” This is the whole of the wages at risk during the voyage. But as the freight cannot be earned till the voyage is completed, it is conceived that where the whole of the freight is brought into contribution, the whole of the wages must be deducted. Were the ship hired by the month, and the seamen (not only paid, but) *hired* by the month also, the case might admit of discussion.

Some persons hold, I presume, on the authority of the Digest—that not only the wages, but the provisions ought to be deducted from the freight,—and a learned and excellent writer before quoted appears to be of this opinion; for in a *pro-forma* statement given of a general average claim, he deducts the wages and victuals from the freight, and this, though the ship is supposed to have sailed from Portsmouth and to have put into Ramsgate in distress. I submit that no satisfactory reason can be given why the ship's provisions, which are part of the ship's stores, should be deducted from the freight;—what is expended of them, as I have endeavoured to show, ought to be deducted from the original value of the *ship*, and not from the amount of the *freight*.

<sup>1</sup> Dig. ad Leg.  
Rhod. l. 2. § 3.  
Ord. Ph. II.  
art. 7.  
Vin. in Peck. &c.

<sup>2</sup> Abbott, p. iii.  
c. 8. § 16.

<sup>3</sup> Ut sup. §. 2.  
art. 2.

If the voyage be very long, and the freight in consequence be consumed by the wages, there is no freight to contribute,—for none having been saved by the sacrifice made, the owner has received no benefit from it. Thus (in reference to the preceding article p. 52.) it would seem that a case may occur, where the *ship* alone shall pay the general average,—that alone having been benefited by the sacrifice.

The ordinance of France says,—the freight of goods jettisoned shall be paid in general average, and shall contribute its proportion<sup>v</sup>;—and this is the practice of all countries<sup>w</sup>. But where the ship puts into an intermediate port, and takes in goods in lieu of those jettisoned—then the freight of these goods, (less the charge of shipping them,) ought to be deducted from the freight of those jettisoned.—Else the owner of the ship would be a gainer by another's loss, contrary to the equitable maxim of the civil law, before quoted, *Nemo debet, &c.*<sup>x</sup>

<sup>v</sup> Ord. Fr. "Aff." art. xiii.  
<sup>w</sup> 1 Magens, p. 289.  
<sup>x</sup> Vide sup. c. 1. S. 1.

This article ought not to be closed without noticing a case which has sometimes occurred;—as where a ship is wrecked off her port of destination,—and the cargo is saved and delivered to the consignees.—There can be no doubt that in such a case, the freight being in the goods, ought to contribute to the expenses incurred in recovering the goods and restoring them to the proprietors (1).

(1) The learned and accurate Lord Kaimes selects this as a fit case to illustrate the equitable maxim of *Nemo debet locupletari aliend jacturâ*.—It was contended that in strict law, the proprietor of the goods was liable for the whole expense of salvage, the expense being wholly incurred in recovering his goods.—But in equity the case will stand thus:—The proprietor of the goods and the

*Article 4. Remarks on the Contributory Interest.*

From what has been said, it may be inferred, that the valuation in a policy of insurance ought not in any manner to affect the value for contribution;—they in fact proceed upon very different *data*—the former having a view to the indemnity of the assured, according to a fixed principle implied or agreed upon between him and the insurer,—and the latter having a relation merely to the value at risk,—which determines the proportion of benefit received.

It has been seen, that the value of the *cargo* to contribute is either the cost on board at the port of loading, or the net proceeds at the port of discharge;—the value of the *ship* is the sum she was worth (as nearly as it can be ascertained,) when, or immediately before the average loss was

owner of the ship are connected by a common interest; the recovering the goods from shipwreck was beneficial to both parties;—to the freighter, because it put him again in possession of his goods, and to the owner of the ship, because it gave him a claim for freight. The *salvage* accordingly was truly *in rem versum* both; and for that reason ought to be paid by both in proportion to the benefit received.

F 2

v Kaimes' Pr.  
Eq. b. i. p. i.  
c. iii. § 2. art. 2.

incurred;—and the value of the *freight* is the actual sum received by the ship-owner, after deducting the seamen's wages.

• *Magens*, p. 69. *Magens* says\*, the value of the ship and cargo to contribute,—is that value which they would have produced neat, for ready money, had they both belonged to one person, and had no sacrifice been made.

It is necessary to observe, that before the apportionment is made of the loss,—each of the interests, viz:—the cargo\*, the ship and the freight, after the value is accurately ascertained, must be severally stript of all the charges attached to it.

• *Poth. Cont. de L.* p. ii. § 1.  
art. 1. n. 114.

In regard to the adjustment,—it may be noticed, that errors sometimes occur in recovering a general average loss of the underwriters, in consequence perhaps of a want of facility in appropriating adjustments of this nature to a policy of insurance; or for want of bearing in mind that the valuation in the policy has no relation to the value for contribution.

It is not necessary, and it only tends to mislead, to state the amount *per cent.* at the foot of an adjustment of a general average loss;—though it appears from a great number of old *manuscript* statements now before me, that this



has been the custom for many years past,—and in some instances the amount payable by each interest is not even mentioned—but merely the sum *per cent.* It is evident, that this rough mode of making the apportionment must have led to erroneous settlements on the policies;—for it is very seldom indeed that the amount *per cent.* on the statement is precisely the *per centage* to be recovered on the policy (1).

(1) An example is selected from many others, of an erroneous settlement which was made at Lloyd's, (in the year 1792,) in consequence of a *per centage* being placed at the foot of the statement of claim for general average:—

The amount of loss, to be made good by a general average contribution,—£207 : 9 : 9.

The Apportionment was as follows:—

“ Ship, valued at.. £1300.	} Making the claim
Cargo,..... 1750.	
Freight, ( <i>net</i> ).... 400.	
	£6 : 0 : 4 per cent.’

The ship was insured at £2000.

The cargo ..... at £2253.

What the freight was insured at does not appear.

The claim was settled on the policies at £6 : 0 : 4 per cent., as in the statement; without any allusion to the difference between the value taken for general contribution and the value in the policies.

It is easy to conceive how this principle would operate, and what errors would be produced, if the amount on which the apportionment was made were decreased, or the value in the policies were much increased. In regard to this remark,—the attention of the reader should be

The ancient laws and the foreign ordinances state, that if the ship escape from the peril for which the sacrifice was made, and get into a port of refuge, the average claim becomes due. The Danish Ordinance says, that the average is to be paid by the insurers as often as it happens, either once or oftener, although the ship be afterwards lost on the same voyage:—and this is conformable to our present practice, in cases where expenses are incurred for the general benefit.

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Before this subject is closed it may be expected that something should be said of the liability of the underwriters to a claim for general average, when adjusted in a foreign country, and according to the laws of that country.

It would be improper to decide at once, without enquiry, that the underwriters are not liable

chiefly directed to policies on goods on board a general ship.

It may be necessary to observe, on the subject of erroneous adjustments, that sometimes the column of particular charges on the *cargo*, contains those charges which should be paid by the underwriter, and also those which should be borne by the proprietor.—Care should be taken to select and appropriate these before a settlement is made on the policy.

*in any case*, because the insurance being effected here the claim must be made up conformably to our laws<sup>b</sup>. It is thought by some, that if the adjustment be made up at an intermediate port by, or under the superintendence or by the order of, a court of competent jurisdiction, and the master is not permitted to proceed on his voyage until he conforms to such arrangements,—the insurers are liable;—it being one of the risks to which they are exposed on foreign voyages, and which ought to be considered by them when they underwrite the policy.—If the master could be borne out by the *facts*, perhaps the case might be worthy attention;—but it can scarcely be conceived that a court would interfere to *compel* the master to have the average claim adjusted—it is more probable that this would be done on the *application of the master himself*, or from his inattention in suffering what he might have prevented. All that the constituted authorities could reasonably require of him would be, that he should re-pay the expenses incurred in a satisfactory manner to the parties; and whether this were done by drawing bills on his owners, or by any other means, has nothing to do with the *adjustment* of the claim; which cannot be at all necessary, or

<sup>b</sup> 1 Magens, p. 5.  
Weskeitt, p. 223.

correct, or even useful, in that stage of the voyage (1).

But the case is different when the claim is adjusted at a foreign port on the termination of the voyage; and it is perhaps by blending the two cases together, that a hasty judgment is formed of the insurers being in *no case* liable to the payment of an average claim as adjusted in a foreign country.—If during the voyage it has been necessary to make a jettison of the cargo, to cut from anchors, &c. for the general safety, it is one of the duties of the master, to see that the loss is replaced by a general contribution; and in case of jettison, or a conversion of part of the cargo to pay the expenses, &c. his liability

(1) Contrary to this however was the opinion of Mr. Park, p. 444, n. Justice Buller at *Nisi Prius*<sup>c</sup>,—who held that the underwriters were liable to a general average as made up at Leghorn (an *intermediate* port) according to the sentence of the court of Pisa;—*because* several brokers proved that they had “in repeated instances adjusted averages under similar sentences, and the underwriters, though with reluctance had always paid them”—that is, settled them as a matter of favour. Nothing can show more strongly than this the abuse of putting out of the question the general law, and allowing the practice of Lloyd’s to be considered as the *custom of merchants*.—*Usage of trade* is doubtless “a sacred thing,” but the *practice of Lloyd’s* is not always to be considered as the usage of trade, much discrimination should be used in admitting such evidence.

to account for the property intrusted to his charge, may often oblige him as an act of self-defence to have the claim adjusted where the voyage ends. It is for the courts of law to determine whether in such a case the underwriters are liable to the apportionment as adjusted according to the *foreign laws*; or whether the statement should be taken to pieces and re-made up here (1).

On the general principle, the judicious Lord Kaimes has observed<sup>d</sup>,—that, “to award execution upon a foreign decree, without admitting any objection against it, would be, for aught the court can know, to support and promote injus-

<sup>d</sup> Kaimes' Pr.  
Eq. b. 3. c. 8.  
§ 5.

(1) Since the first edition of this Essay it has been decided; after argument before the Judges of the Court of King's Bench, that the underwriter on a policy in the usual form on goods bound to a foreign country, is not liable to indemnify the assured, (a subject of that country,) who is obliged by the decree of a court there to pay contribution to a general average, which by the law of this country could not have been demanded. Lord Ellenborough, who delivered the judgment of the court, said, that the underwriters in this case had a right to insist that the general average to which alone their indemnity is confined, is general average *as it is understood in England*, where this contract of indemnity is formed; unless it should appear that the parties contracted under a usage among merchants relative to the same subject, and shown to have obtained in the country where by the terms of the contract the adventure is made to determine<sup>e</sup>.

<sup>e</sup> 4 M. and Sel.  
Rep. p. 141.

tice." " Courts were instituted to repress, not to enforce wrong, and the judge who enforces any unlawful paction becomes accessory to the wrong." " In our decisions upon foreign prescriptions it is commonly the point disputed,—whether such or those of our own country ought to be the rule. This never ought to be a dispute, for every case that comes under our own laws must be decided by that law, and not by the law of any other country."

CHAPTER II.

OF PARTICULAR AVERAGE,

OR

PARTIAL LOSS

ON GOODS.

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It has been endeavoured to be shown, that the term "average" is not applicable to any other species of claim, than that for a *sacrifice* made when the ship is in imminent danger, or for *expenses* incurred for the general benefit. And which claim is to be divided by a given *ratio*, or a mean proportion, and to be borne by all the parties concerned in the adventure, and who were proportionably benefited thereby.

The foreign ordinances and writers use the term "particular average loss," or "simple average," merely in opposition to a general,—or "gross average loss;" contenting themselves with assigning as a reason for this distinction,—that the one species of loss is to be borne *gene-*

rally, by all the parties concerned, and the other particularly by one of them. But they do not define how the word "average" can be applicable to any particular species of loss (1).

The meaning of the term "particular average" as used in Lloyd's, is a partial loss of the ship, cargo, or freight, of any kind whatsoever, and arising from any cause. (Except from shipwreck—which is called "a salvage loss.")—The term therefore includes,—*first*,—a total loss of a part of the thing insured; and *secondly*,—a pecuniary loss to the proprietor of it, arising from the effects of sea-damage.

If we retain the term, which from its apparent usefulness, as a distinctive appellation, we may perhaps be justified in doing; it should be expressly confined to the latter kind of loss, or

\* 1 Rob. Adm.  
Rep. p. 293.

(1) The learned judge of the Admiralty Court says\*,—  
"Simple or particular average is not a very accurate expression; for it means damage incurred by or for one part of the concern which that part must bear alone; so that in fact it is no average at all, but still the expression is sufficiently understood and received into familiar use." The term *Average Loss* is quite unsettled as it relates to what has been called in the courts of law, "that very strange instrument,"—a policy of insurance. In the law all kinds of expenses are recoverable short of a total loss, under the head of average. In foreign documents, when a ship puts into a port with damage, she is said to have arrived "under average."



rather to the *mode* of adjustment. There can be no objection to the expression, though confessedly anomalous, if we give to it a determinate signification.

Still the word "average," as it appears at the foot of our policies, will need some revision, if at any time the wording of the instrument itself should undergo an alteration <sup>b</sup>.

<sup>b</sup> Vide infra,  
Part IV.

The term "*particular average*" is used in this Essay, to signify the mode of adjusting a loss on goods arising from the article being deteriorated in value, in consequence of its being sea-damaged;—and the term "*partial loss*," to signify a total loss of part of the thing insured.

There are two modes of adjusting a loss on goods sea-damaged,—these are as follow:—*First*,—By deducting the neat proceeds of sale of the damaged goods from the amount of the interest; which is either the value in the policy<sup>c</sup>, or the invoice covered with the premium, &c. *Secondly*,—By a comparison of the amount of the sales of the damaged, with a *pro forma* account of sales of the same article, if it had arrived in a sound state. The first mode of adjustment is in point of fact "*a salvage*

<sup>c</sup> Vide infra  
Part III.

*loss;*"—the second is that which it is proposed shall continue to bear the appellation of "*a particular average.*"

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The foreign writers afford us very little information on the subject before us; and the books on the law of insurance in this country give us no idea that can be acted on, of the mode of ascertaining the amount of loss, or the claim on the underwriter,—i. e. *the principles of adjustment*. For almost the whole of our information on the stating of averages we are indebted to Magens; who has gone a very considerable length into the different modes of adjusting claims, and has thrown more light on that subject than all the other writers on insurance up to the present day. Probably the paucity of information in our modern books, which profess to treat only of the law of insurance, arises from its appearing to the learned authors to be not within their province to descend to matters of calculation.

## SECT. I.

OF A PARTIAL LOSS, COMMONLY CALLED  
A SALVAGE LOSS.

A salvage loss, (from which this mode of adjustment is derived,)—is that kind of loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss. The charges incurred are called “salvage charges (1),”—the property saved is

(1) The most prominent among salvage charges, in case of shipwreck in foreign countries, is the *seamen's wages*; for which they (the seamen) have been considered as having a *lien* on the proceeds of sale of the hull of the ship and her materials; and if the amount of these be not sufficient, the deficiency is to be made up from the proceeds of the cargo<sup>d</sup>. There is no foundation for this in the law of England. “Freight is the mother of wages”<sup>592</sup>. —if freight be not earned wages are not due; and the freight can only be earned by the contract being fulfilled: —*i. e.* by the master delivering the cargo, or causing it to be delivered, at the port of discharge. The error noticed above, may have arisen from the generally received, and correct idea, of the seamen's wages *being secured to them on the bottom of the ship*<sup>1</sup>; but by this is only meant—that on the ship's arrival, *i. e.* on the voyage being performed,—if the owner be insolvent, the seamen

<sup>d</sup> Weskett, p. 592.  
<sup>e</sup> Pr. Eq. b. 1. p. 1. c, 4. § 5.

<sup>1</sup> 2 Rob. Adm. Rep. p. 237.

“the salvage,”—and the difference between the amount of the salvage (after deducting the

may attach the ship, and sue in the Admiralty Court for the amount of their wages.

But when it is said, that in case of shipwreck the seamen are not entitled to their wages as a matter of right, *i. e.* that they have no *lien* on the salvage for them,—it must be far from the wish of every friend to the success of maritime adventure, that the seamen should not receive a remuneration for their trouble and the risk to which they may expose themselves, in saving and preserving the wrecked property;—there is no doubt that they are fully entitled to an equitable consideration to the full extent of the services performed by them, and this should be deducted from the proceeds of the property saved. Indeed when the accident happens in the British dominions, provision is made by statute <sup>c</sup>, that the master, the officers, and the mariners shall be reasonably gratified for their trouble and risk.

<sup>a</sup> 12 Ann. 8t. 2.

<sup>c</sup> 18. made perpetual by 4 Geo.

1. & 26 Geo. II.

<sup>b</sup> Leg. Rhod.

art. iii. Leg.

Olor. art. iii. Leg.

Wish. art. xv.

Hanseatic Ord.

tit. 9. art. 5. Ord.

France, liv. iii.

tit. 4. “*Loyer de*

*Matelots*,” art. 9.

& Valin thereon.

<sup>f</sup> Leg. Olor. art.

iv. Leg. Wish.

art. xvi. &c. Ord.

France, & Valin

thereon, ut sup.

Roccus Not.

lxxxi. n. 212, &c.

& authors cited

by him. L. Mans-

field. 2 Bur. Rep.

889, who quotes

the *Consolato del*

*Mare*. Abbot, p.

266.

<sup>h</sup> Bur. Rep. p.

1845.

The old marine laws <sup>h</sup>, &c. perhaps from allowing freight according to the length of the voyage performed, (*pro rata itineris peracti* <sup>i</sup>), are favourable to the principle of giving the seamen their wages to the time, out of the proceeds of the sale of the vessel, in case of shipwreck; and some add a reasonable sum to carry them home, if they assisted to the best of their power in saving the ship and cargo; otherwise, they were to have neither wages nor reward. But the marine laws of all countries agree, that if the ship and cargo be entirely lost the seamen shall lose their wages. And by the common law of England, “if the freighter lose his cargo, the mariner ought to lose his wages <sup>k</sup>.”

It is said, that “upon general principles, the seamen are entitled to no wages if no freight be earned.”—“The

charges,) and the original value of the property is called "the salvage loss."

claim of the seamen on the ship seems not to extend to a case, wherein, according to the principles of the law upon which their claim is founded, no wages are payable to them<sup>1</sup>."

<sup>1</sup> Abbott, Part iv.  
c. 2. § 6.

But the strongest argument for their not being entitled to wages in case of shipwreck is, the agreement between them and the master, by which they bind themselves not to demand, and agree that they will not consider themselves entitled to their wages, or any part thereof, until the arrival of the ship, and her discharge, at the port of destination. If however part or the whole of the cargo were saved, and by being carried on to the port of destination the freight were earned—the seamen should be paid their wages *in proportion to the amount of the freight received*, after deducting therefrom the charges of salvage and carriage of the goods to the port of discharge.

A cause was lately decided<sup>m</sup>, from which it would seem = Campbell's  
that in case of shipwreck short of the port of destination; *Rep. N. P. p.*  
a distinction is made between seamen being hired by the *197.*  
*month* and by the *voyage*. Now it is well known, as before mentioned<sup>n</sup>, that in most cases seamen are *hired* for = *Utsupra*, §. 1.  
the *voyage* but *paid* by the *month*;—and this distinction *art. 2.*  
should always be kept in view in matters of this nature.

The Spanish seamen, who appear to be more independent than those of other nations, guard against any loss of wages from accidents of this nature; for they will not quit any of the ports in New Spain till a box of dollars, (called thence,—"*Caja de Soldada*,") be put on board for the express purpose of paying them, (or rather, of their paying themselves,) their wages in case of shipwreck. In illustration of this, we may quote a sea-protest made lately on the loss of a Spanish ship, which says that "the

In general, a salvage loss of *goods* is, when in consequence of shipwreck or the perils of the sea, the vessel is prevented from proceeding on her voyage, and the cargo, or the part that is saved, is obliged to be sold at a place short of the port of destination. In such cases, though the property be not abandoned to the underwriters, *the principle of abandonment is assumed*, and is in fact acted upon ;—the property saved does not indeed actually belong to the insurers, as where a regular abandonment is allowed (1), but it is to all intents and purposes treated as if it did, and all the charges incurred are borne by them. The principle acted on is this ;—the underwriter pays a total loss, and takes the proceeds of the goods.

Both in the abstract and in practice, this

crew escaped saving nothing but the *Caza de Soldada*, put on board for the payment of their wages." This is probably a vestige of ancient commerce ; for when navigation was comparatively but little known, shipwrecks were much more frequent, and seamen would make their own terms with their employers.

(1) It should be always understood that where there is no abandonment, the salvage is always for the *benefit of the assured*, and not of the underwriters°. If this were generally known, we should have fewer sales made "on account of the underwriters," which, in almost every case is erroneous.

• 4 Taunt. Rep.  
803.

mode of adjustment appears but ill calculated to give the merchant his indemnity in case of partial loss on goods by their being sea-damaged;—and accordingly, there is but one case that can justify a claim of this nature being calculated on the basis of a salvage loss.

This case is as follows:—when a ship on her voyage puts into an intermediate port in distress, to refit, &c. and on unloading the cargo it is discovered that some of the goods are damaged, which, to prevent further deterioration, are surveyed and sold on the spot.—In such a case, the claim must be adjusted as a salvage loss, and all the charges must be borne by the insurers;—for no particular average claim, according to the definition above stated, can be made up when the goods are sold at any other place than the port of destination. Here the damaged goods are really (not, as the term is often misapplied,) sold on account of the underwriter (1), he paying all the charges, and even

(1) It is customary, (as alluded to in the preceding note,) not only in foreign countries but in England, for persons effecting sales of damaged goods, to state that they are sold “on account of” or “for the benefit of the underwriters;” and this is often done without the parties even having the means of knowing that the property is insured. Such a practice ought not to be continued: the correct expression in such cases is, “on account of the concerned.”

the freight (1), and the merchant is indemnified as for a total loss;—*ex. gr.* he receives the neat

\* Abbott, p. iii. c. 7. § 10. and auth. cited.

(1) According to law and custom, no freight is due unless the master shall have complied with his contract, as expressed in the bill of lading, by delivering the goods to the consignee at the port of destination,—yet, if the goods were received by the merchant, (or, which is the same thing, by his agent authorised for that purpose,) at a port short of the destined one, either the full freight or freight *pro rata itineris* should be allowed \*. In the case of *damaged goods* landed and sold at an intermediate port, it being for the benefit of the proprietor that they should be there sold, the freight must be paid;—it being taken for granted that it is always for the interest of the proprietor, (and the underwriter, if insured,) that the goods should be sold;—but this freight should not be in proportion to the proximity to, or the distance from, the port of discharge; but the full freight, for that is what is sacrificed by the goods being sold at the intermediate port. This is the only case where the underwriter on goods ought to pay the *freight*,—because it is for his interest to do so. But it is to be understood that the ship must actually proceed on the voyage and arrive; for if she cannot earn her freight the owner has not suffered any loss by the sale at the intermediate port. And therefore the loss would fall on the underwriters on freight (if it were insured,) and not on the underwriters on goods.—Pothier says †,—If the merchants shall take out their goods during the voyage, (alluding to the ancient custom of merchants sailing with their goods‡,) the whole of the freight becomes due the same as if they had remained.

† Pothier, *Sup. Fr. C. de L.* n. 121.

‡ Ut sup. c. 1. §. 1. art. 1. *Il Cons. del Mare*, c. 91.

This relates to goods which are merely deteriorated in value by sea-damage, or taken out by the merchant or his agent. If however there were a *total loss* of any part, the freight could be demanded on only what remained;—the underwriter on the freight (if it were in-



proceeds from the person who effects the sales, and the balance from the underwriter.

It is only when the damaged goods are, from the necessity of the case, sold at a port short of that of the ship's destination (1), that this is a

sured) paying the amount of the deficiency. But if the goods were so much damaged as to be worthless, though they remained *in bulk*, it is conceived that the loss of freight should be borne by the proprietor of the goods;—for as it is only in consequence of the assumption that the underwriter on the goods reaps an advantage from the sale, that *he* is called upon for the freight;—and, as the practice at present stands, it would seem that there must be an actual loss of the article, or thing insured, before the underwriter on the freight is liable; so this case, from coming under neither of these heads, appears to be an unavoidable mercantile risk which is not provided for. But it may perhaps be urged, that in *such a case*, the master would have no right to leave the goods at the intermediate port, but ought to carry them on to the port of discharge: this would not however relieve the merchant. A case might occur, such for instance, as damaged coffee, where it would be dangerous to take the goods on board again; perhaps in such a case the loss may be considered as tantamount to a total loss of the article by a peril of the sea,—and then the underwriter on the freight would be liable.

(1) The present practice of Amsterdam as relative to salvage losses, is agreeable to that stated above. In the rules established in the Department of Insurance in that city, (art. 35.) it is said;—"If owing to stress of weather, or other accident at sea, any merchandise, whether sound or damaged, be sold at the place of its redemption, and

correct or a legitimate mode of adjustment;— For when this method of calculation is applied to ascertain the claim for loss on damaged goods after the ship's arrival, it is, as will be fully shown hereafter, exceedingly erroneous.

## SECT. II.

### OF A PARTIAL LOSS, COMMONLY CALLED A PARTICULAR AVERAGE.

The mode of ascertaining the amount of the claim on the insurers on goods, for loss by deterioration in consequence of sea-damage, has had the attention of many intelligent persons both in and out of Lloyd's. It is now agreed, that the only correct mode of adjusting a loss of this kind, where the ship has arrived at, or the goods have been brought to the port of destination, is by comparing the market price of the sound merchandise with the market price of the

*not that of its destination*, all charges without distinction, as well as that proportion of freight allowed for the conveyance of such part of the cargo as may be saved, should be deducted from the produce of the sale thereof, and the deficiency, as given by the neat amount of the invoice, will be due from the underwriter."

damaged; and thus ascertaining the relative depreciation in value sustained by the merchant from the sea-damage. In the present state of the practice, this needs only to be mentioned to be recognised as correct. It then follows, that the mode of adjusting such a claim on the principle of a salvage loss, cannot be a just one, because it has no reference to the market price; and, consequently, in almost every instance, it gives the assured either more or less than he is justly entitled to; and the only security that he has against actual loss is in the case of a saving or a losing market. But the result to be desired, is that which will indemnify him in *all cases* against the depreciation in value of his goods by the damage sustained, and which may be acted upon in *all cases* as a general principle. It would, indeed, be easy to produce an instance of goods being damaged *fifty* per cent., or more, which, if adjusted as a salvage loss, would not only free the underwriters from all claim, but leave them gainers by the transaction,—on the assumption, (as in cases of this nature it is assumed,) that the damaged goods become their property.

But though the mode of adjustment in use has a reference to the market price, it is perfectly understood that the underwriter has no

concern with the fluctuation of the markets; and therefore whether they be high or low, it is of no importance to him. The merchant makes use of them merely as scales to show the relative depreciation in value of the damaged goods;—for (to carry the simile further,) if sound merchandise of the same quality were put in one scale, and the damaged merchandise in the other, and the sound weighed one hundred pounds, and the damaged but fifty pounds, it would be shown that the goods had lost *fifty* per cent. of their original value;—and by this means the proportion of deterioration would be accurately ascertained.

This may serve to elucidate the present practice, and to show the principle on which all particular averages are, or ought to be adjusted. —And in point of fact, there is no difference of opinion on this, as a general proposition;—the difference arises on the question of the *charges* being deducted from the sound and damaged sales,—the assured contending, that he has a right to deduct the freight, duties, and landing charges from the sound and the damaged sales, before he ascertains the depreciation in value; —and the insurer holding, that *he* has no concern with these charges;—he guaranteeing the assured against any depreciation in value that

the goods may sustain, *and nothing more* :—  
*i. e.* not having insured the freight and duties,  
 he ought not to be called on for a loss of any  
 part of them ;—and, more particularly, as by  
 the operation of deducting them from the sales,  
 he is involved in the rise and fall of the markets.  
 Certainly, the assured is correct in asserting,  
 that unless his terms be complied with, he must  
 be a loser by the arrival of the damaged goods ;  
 —but it might be answered,—that even if they  
 were, few cases would occur where he would get  
 his precise indemnity <sup>1</sup>.

<sup>1</sup> Vide inf. § iii.  
 art. 3.

Previously to entering into an examination of  
 this principle, it may be proper to give a brief  
 history of the subject before us.

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The principle of adjusting a particular average  
 as a *salvage loss*, would appear from the sim-  
 plicity of the operation to have been the original  
 mode adopted by the merchant in stating his  
 claim on the underwriter ;—thus we know, that  
 in those countries where commerce, and conse-  
 quently civilization, are of late date, and among  
 all persons who have not well studied the prin-  
 ciples of insurance, this mode of adjustment is

still approved and acted upon. But as both the merchant and the underwriter became interested in the question whether this were the correct method on the one hand of obtaining, and on the other of granting an indemnity, it could not be expected that this erroneous mode of adjustment would hold its ground; but that other means, approximating nearer towards the true principles of insurance, would be discovered and adopted:—for the *merchant* would find, that if his goods came to a gaining market he could not be indemnified against the damage they received without a reference to the market price of the sound;—and the *underwriter* would learn, that by this mode he not only paid for the damage done to the goods, but also gave the merchant a saving price for them when they arrived at a losing market.

When the Hanse-towns and the Low-countries were the emperium of the commerce of Europe, and their merchants the most acute and the best informed of any then in the world, these considerations could not fail to occur to them,—and accordingly, there is reason to think that the principle of adjustment by a reference to the market price of the sound goods origi-

nated either in *Hamburg* (1) or in *Amsterdam* ; and though we have very little satisfactory information on this subject, these ordinances avow the principle of the merchant being his own underwriter for the profit accruing on the goods.

The principle of adjustment either as a salvage loss, or on the comparison of the neat proceeds of the sound and damaged goods, appears to have been the generally received doctrine in this country till about thirty years ago. *Magens*, in his "*Essay on Insurance*," is decidedly favourable to the latter mode, though the adjustment on the gross produce was agitated in his time ;—but from being a merchant himself he was well able to judge that the assured could not be fully indemnified by this mode.

(1) As it must not be imagined that any thing has been stated contrary to the fact, for the purpose of supporting an hypothesis, the reader is referred to p. 92. (*ut infra*) where it will be found that a particular average was adjusted at *Hamburg* in 1719, by a *dispacheur* of eminence, on the above principle ;—though the ordinance of *Hamburg* of twelve years' posterior date, enacts <sup>Ord. Hamb.</sup> " that when <sup>tit. 12. art. 14.</sup> any part of goods valued in a policy shall be found damaged, they shall be separated from those not damaged, and sold publicly by themselves whether many or few, and the *dispacheur* of averages shall regulate the damage conformable to the valuation made in the policy without regarding what the goods not damaged would produce." Was it intended that this should hold only in case of a valued policy ?

Weskett is also favourable to the adjustment on the neat proceeds, but his reasoning is inconclusive, and appears to be founded on erroneous

ⁱ Weskett, art.  
"Average," p.  
24.

*data* ⁱ.

I find (from manuscript statements,) that in 1784, the principle of adjustment on the gross produce, as the basis of calculation, was then coming into use in Lloyd's; though it was not generally acted upon there until about twenty years after, when it was recognised by the courts of law. But it is by no means a new doctrine, —for a particular average (on linens, from Ham-  
burgh to Lisbon) was calculated at Ham-  
burgh on that principle, so long ago as the year 1719,  
by Jurgen Greve, a *dispatcheur* of celebrity in

ⁱ 1 Mag. p. 216. that city ⁱ. And in 1721 we have a statement of a particular average made up also at Ham-  
burgh, wherein the gross produce is the basis of

ⁱ 2 Mag. p. 209. contribution ⁱ. This average is however ad-

ⁱ Vide inf. § iii. justed on an erroneous principle ⁱ; for the as-  
art. 2.

sured claimed the difference between what the goods would have produced if they had arrived sound, and what they did produce being da-  
maged, to which were added the extra charges.

It is worthy of notice that in 1750 a claim for a particular average was adjusted on the gross produce, adding the extra charges to the amount

ⁱ 1 Mag. p. 182. of the loss, as is now the custom of Lloyd's ⁱ.



The Amsterdam ordinance (1744) fully recognises the principle<sup>a</sup>;—the words are;—“The average or damage on goods that happened during the voyage by outward misfortune, shall be repartitioned on the *gross capital* that the goods being sound would have amounted to at the place of their destination.” On this Mogens (who, it has been noticed, opposed the adjustment on the basis of the gross produce) takes occasion to remark—“that whenever the goods come to a gaining market no doubt can be made that the damages should be repartitioned on the neat produce, and the insured bear his part for what did not pay a premium; and,” he adds, “when they come to a losing market, the repartition should be at what he valued them at in his policy<sup>b</sup>.”

<sup>a</sup> Ord. Amst. art. 35.

<sup>b</sup> 1 Mag. pp. 38. 209.

In 1761 it was finally determined, that in all adjustments of loss on goods sea-damaged, reference must be had to the markets to determine the proportion of injury which the goods have sustained.

The cause of *Lewis v. Rucker*<sup>c</sup> (in the Court of King's Bench) settled this important point. It was contended on the trial, that the assured ought to have made good to him the difference between the value in the policy and the price the damaged goods sold for, (*i. e.* what is com-

<sup>c</sup> 2 Burrow's, Term. Rep. 1167.

monly called "a salvage loss"). The underwriters, on the contrary, offered to call witnesses to prove the general usage of estimating the *quantum* of damage to be by a reference to the market price of the damaged and sound goods. For the only question was,—“by what measure or rule the damage ought to be estimated.”

On attentively perusing the luminous and excellently well-digested “resolution” of the court delivered by Lord Mansfield, on a motion for a new trial,—the impression is, that the gross produce (though the question was not agitated at the time,) was then virtually determined to be the true rule of calculation; because it does in fact settle all the great points since contended for.

<sup>d</sup> 2 East's Term Rep. p. 581.

The cause of *Johnson v. Shedden*<sup>d</sup>, (1) which three times engaged the attention of the Court of King's Bench, at length put this question to rest. The judgment was delayed in consequence

<sup>e</sup> 2 Marsh. p. 630. 2d. edit.

(1) There is an error of the press in Mr. Sergeant Marshall's quotation “—of Mr. Justice Lawrence's opinion of the court in *Johnson v. Shedden*, which though it may seem but of trifling consequence, needs correction, as it might confuse any person unacquainted with the principle of adjustment in question:—He (the judge) is there made to say, “if the purchaser were not liable to the duties and charges, we would give as much more as the amount of those charges comes to.” Thus making it appear as if it were meant—the court would give—the word should be *he*.

of a difference of opinion while Lord Kenyon presided in the court; and the late lord chief justice Ellenborough forbore to give an opinion, he having been one of the counsel for the underwriters on the trial; the court was therefore composed of the *puisne* judges,—Grose, Lawrence, and Le Blanc.

It may appear surprising, that though the mode of calculating a particular average by a reference to the markets, had been known in Europe nearly a century when this judgment was given by the Court of King's Bench, the important point,—whether the gross produce, or the neat proceeds, should be considered the basis of calculation, was not determined till that day.

This cause, known in Lloyd's by the appellation of "the Brimstone cause," (from the nature of part of the merchandise insured,) was tried on its merits, and a juror was agreed to be withdrawn, that the amount of the damages might be ascertained. In consequence of this the claim was made up for adjustment on the ground of the *neat proceeds*. But on a motion for a new trial, the court after two arguments, determined that the foundation of the calculation was erroneous, (as had been previously shown by a gentleman of high and deserved

eminence in the commercial world,) (1) and that the true mode of calculating a partial loss on goods sea-damaged, and ascertaining the extent of the underwriter's liability, is by a comparison between the *gross produce* of the sound and damaged goods. The judgment of the court was given at great length, and the reasoning is sound and conclusive.

It is not my intention to lengthen out this Essay by giving an abstract of the able and clear reports of these two adjudged cases,—the perusal of them will well repay the attention of the commercial reader.

3 Bos. & Pul.  
Rep. p. 308.

In Michaelmas Term, 1802, the court of Common Pleas approved the rule laid down by the Court of King's Bench<sup>1</sup>. The adjustment of a partial loss on goods sea-damaged, by a comparison between the gross produce of the sound and the damaged sales, may therefore now be considered the law of England.

It should always be borne in mind, that it is to the laudable and persevering efforts of *Mr. Shedden*, the defendant in the before-mentioned cause that the commercial world is indebted for the settlement of this very important question.

On the 4th August, 1802, a general meeting

(1) The late Edward Vaux, Esq.

was held of the subscribers to Lloyd's, by which a Committee of ten gentlemen was appointed, for the purpose of taking into its consideration the impositions which (particularly during peace,) (1) the underwriters were subject to "in the making up of averages," and to propose a remedy for the same. On the 28th February, in the following year, the subscribers were informed, that the committee had not then come to any decision on the subject.—I have reason to know that they were very anxious to promote the object of their appointment, but the war breaking out again probably prevented any thing definitive being done.

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Having thus gone through the history of the

(1) It may be proper to notice, that though the breaking-out of the war prevented this Committee from being as useful as they wished to have been, yet it is probable that the subscribers were indebted to them for the adoption of a rule, which was at the time found very salutary in its effects:—that of demanding, in case of claims for partial loss by sea-damage in foreign countries, (particularly in the Mediterranean) a certificate of survey signed by two resident British merchants; a clause to this effect was inserted in the policy, and was called (from the gentleman with whom it originated,) "Mr. Angerstein's Clause." These certificates have however, like most things of this kind, such as those of Lloyd's Agents, &c. become nearly nugatory, and are but little to be depended on.

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modes of adjusting particular averages, I am obliged to remark, with some regret, that though the question is probably put to rest in the courts of law, there is reason to think, (perhaps from the grounds of the above decisions not being so well known as they ought to be,) that some dissatisfaction still prevails in the commercial world. To obviate this, if it be possible, or at least to endeavour to put the subject in so clear a point of view that it may be known in what the difference of opinion consists, will be the object of the remainder of this chapter.

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The intention and end of insurance is, “*to indemnify the assured.*” In what does this indemnity consist?—It has been answered, by quoting only part of a sentence of Lord Mansfield <sup>2 Bar. Rep. ut sup.</sup> *field* *5*, without regarding the context,—in “putting the merchant in the same condition which he would have been in if the goods had arrived free from damage.”—Now, it is evident, that if this were to be strictly insisted on, the *gross proceeds* could not be the proper mode of adjustment;—nor would any other mode with which we are acquainted suit all the cases that might occur—for if we try it on the *net proceeds*, the merchant would only on a saving

market<sup>b</sup> be put “in the same condition which he would have been in if the goods had arrived free from damage.” While on a losing market he would actually make a profit of the underwriter<sup>i</sup>. But this latter mode of adjustment was evidently not in the contemplation of the court when his lordship delivered its judgment. For he says,—“the underwriter has nothing to do with the rise or fall of the market,—nor with the price of the thing.”—But the adjustment on the neat proceeds does involve the underwriter in both these considerations.

<sup>b</sup> Vide inf. § iii.  
art. 3. ex. 1.

<sup>i</sup> Vide inf. § iii.  
art. 3. ex. 2.

From the above decisions, and from what can be collected of the general opinion of well-informed men, the object of the policy is, *to insure the merchant against any injury which his goods may sustain from depreciation in value, by their being sea-damaged*,—and nothing more.—That this object may be fully attained in all cases by the adjustment on a comparison between the *gross produce* of the sound and damaged goods, will be shown in the course of the following section ;—and further,—that this mode is the only one which secures to the merchant his rights, without infringing on those of the underwriter.

## SECT. III.

## OF THE VARIOUS MODES OF ADJUSTMENT.

In the examination of the subjects treated of in this section, I have conceived that no mode would lead to the desired result, so soon or so correctly, as that of a direct analytical investigation; and if in the pursuance of this plan it be thought necessary to apologise to my experienced readers, it is hoped that the attempt to reconcile opposite interests, and thus to promote an union of opinion on matters of some consequence, will be considered a sufficient excuse.

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There are four modes of adjusting a partial loss on goods deteriorated by sea-damage, each of which has had its advocates;—these modes are as follow:—

1. As a SALVAGE LOSS.
2. On the DIFFERENCE between the sound and damaged sales, without a reference to the cost.



3. On a comparison between the NEAT PROCEEDS of sale of the sound and damaged goods.

4. On a comparison between the GROSS PRODUCE of the same.

I shall treat of these in the above order, and of some other subjects connected with this section.

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In the following calculations let these *data* be assumed,—EXCEPT *where alterations are necessary for the better elucidation of the argument, viz:—*

*Interest*,—£500;—being the amount of the invoice, covered with the premium of insurance, &c.

*Deterioration*,—one-half.

*Charges*,—£100;—being the amount of freight and duties.

<i>Loss</i> ,—On a losing market	} £50 per cent. on the amount of the Interest.
<i>Profit</i> ,—On a gaining market	

*Article 1. On the Adjustment of a Partial  
Loss by Deterioration, on the Principle of a  
SALVAGE LOSS.*

An adjustment on this principle cannot be correct, because it does not act uniformly; but is made to depend entirely on the *markets*, which regulate the claim on the underwriter, and in the fluctuations of which he is involved with the merchant: and, moreover, in consequence of no comparison being made between the market price of the sound and damaged goods, the merchant is deprived in some cases of any redress whatever, though his loss may be considerable from the deterioration of the goods.

(1) FIRST EXAMPLE.

*On a Saving Market.*

Amount of interest.....	£500	
Deduct gross produce of the damaged sales.....	£300	
Less charges.....	100	
	<hr/>	200
		<hr/>
	Loss	£300
		<hr/>

(1) In statements of particular averages adjusted as a salvage loss, it has been customary for the merchant abroad

The goods are damaged *one-half*, viz:—  
 £250; but the claim is for £300—which is  
 £50 more than the amount of the injury the  
 goods have sustained from depreciation in value;  
 which £50 is precisely the proportion of charges  
 (*i. e.* freight and duties,) on the value of the  
 goods, lost by the deterioration:—*ex. gr.*

To amount of invoice, premium, &c. ....	£500
To amount of freight and duties.. ..	100
	<u>£600</u>

By amount received from damaged sales.... £300

By amount of claim on the underwriters

£300

viz:—For deterioration..... £250

For half the freight and duties; the

goods being damaged <i>one-half</i> .....	50
	<u>300</u>

£600

---

to charge his commission on the damaged sales. The  
 practice of Lloyd's is to allow this, only when the goods  
 are consigned for sale, and consequently where the mer-  
 chant acts as an agent. When the property is his own he  
 does no more than he is bound to do;—he sends the goods  
 to auction, and receives the proceeds of the auctioneer,  
 and calls on the underwriter for his loss—this is the whole  
 process, and there the matter ends. On this subject see  
 (a few pages further) a quotation from Valin's Commen-  
 tary on the Ordinance of the Marine of Louis XIV.

SECOND EXAMPLE.

*On a losing Market.*

Amount of interest .....	£500
Deduct gross produce of the damaged sales	£175
Less charges.....	100
	<hr/>
	75
	<hr/>
	Less £425
	<hr/>

Here the insurer makes good to the assured the whole of his loss;—for the underwriter pays the balance of the account: *ex. gr.*

To amount of invoice, premium, freight, duties, &c. ut supra,—.....	£600
By amount of damaged sales .....	175
By claim on the underwriters .....	£425
<i>viz:</i> —For deterioration.....	250
Half the freight and duties.....	50
Half the loss of markets.....	125
	<hr/>
	425
	<hr/>
	£600
	<hr/>

This example serves as one reason why a preference is given in foreign countries to this mode of adjustment. It is particularly prevalent in the United States; and if we had not good reason to know that few even of the best informed merchants there are unacquainted with any other mode, we might be uncharitable enough to imagine this a sufficient reason for

the numerous claims made of late years from those countries, when the markets have been overstocked with British manufactures;—for it has been seen, that on a *saving market* the merchant is fully indemnified,—i. e. he is put “in the same condition which he would have been in if the goods had arrived free from damage<sup>k</sup> ;”—and on a *losing market* he is not<sup>k</sup> Vide supra, ex. 1. only indemnified against the depreciation in value, and the loss of the freight and duties,—but he is put in the same condition as if his goods had arrived at a saving market.

Thus far by this mode of adjustment, the foreign merchant secures himself against,—*first*,—any loss arising from the damage done to his goods;—*secondly*,—from the loss occasioned by the payment of the full freight and duties on the damaged goods;—and *lastly*,—from the loss of the market. And thus a full and complete abandonment of the damaged goods to the underwriter is assumed and acted upon. It would be well however if the parties were to recollect the excellent observation of that most sagacious commentator,—*Valin*’; “The insurer<sup>l</sup> Val. Com. p. 104. is not always in the place of the assured; he is only guarantee to him for the damage that may happen to the thing insured.”

## THIRD EXAMPLE.

*On a profitable Market.*

*Case 1.* On the preceding *datum* of 50 per cent. profit.

Amount of interest..... £500

Deduct gross produce of the damaged sale £425

Less charges..... 100

325

Loss £175

In this case, the assured falls short of his *true* indemnity £75—because no comparison is made between the market price of the sound and damaged goods,—and where goods are deteriorated in value by sea-damage, no measure can be taken from the *prime cost* to ascertain the quantity of

such damage<sup>m</sup>.  
 = 2 Bur. Rep. p. 1170.

*Case 2.* Let the profit be increased to 120 per cent., then:—

Amount of interest..... £500

Gross produce of damaged sales..... £600

Deduct the charges..... 100

£500

Thus,—though the goods are still damaged one-half, the assured has no claim on the insurer; for the neat proceeds of sales of the damaged goods are the amount of the prime cost.

If we extend the comparison, and assume the profit to be greater than 120 per cent., then, (as on this principle the goods are supposed to belong to the underwriter,) instead of the assured having a claim on the insurer for £250, to which sum he is justly entitled, (the goods being deteriorated to that extent,) he,—the insurer, would receive a profit from the assured.

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It will be readily inferred that this is an exceedingly erroneous mode of adjusting partial losses; and that so far from admitting of general application, it will not be correct even in any *one* instance,—i. e. if the definition of *indemnity* before given be allowed.

As it is the object of all mercantile speculation that goods should go to a profitable market, it appears surprising that this mode, which in such a case can never give the merchant his indemnity, should so long have had the preference to all others.

The reason for continuing the use of it, in preference to a comparison between the value of the sound and damaged goods, is said to be;—because there are no means of determining the market price of *manufactured goods*, or in

fact, that there is no market price. But this will admit of doubt ;—for instance,—manufactured goods are sold in our colonies, and in foreign countries, across the Atlantic, at an advance on the invoice cost :—if therefore a trustworthy certificate could be obtained in these cases, why should we not place the same confidence in it, as we do in a certificate of the sound value of colonial produce ? If such a plan were to be adopted the mode of adjustment would

<sup>a</sup> Vide Appendix ii. not be difficult <sup>n</sup>.

It has been objected to this,—that the value of some articles, such, for instance, as printed calicoes, depends on the fashion of the day, and according to that, the advance would be high or low, and therefore the underwriter would be affected by it ;—but this objection has no foundation ; (as will be seen in the note,) for the underwriter has no more to do with the *advance* than he has with the price.

*Article 2. On the Adjustment of a Partial Loss by Deterioration, on merely the DIFFERENCE between the Sound and Damaged Sales.*

If the adjustment be made merely on a comparison between the market-price of the sound



and damaged goods, without a reference to the prime cost, it appears to me to be clear, that it can hold good only in the single case, where the value of the sound produce is precisely the same as the amount of the prime cost.

It has however been contended by the assured<sup>o</sup>, that where the goods have come to a *profitable market*, he is entitled to the *difference* between the price for which the damaged and undamaged goods have been sold at the port of delivery,—for so much has he lost. And on the other hand,—the insurer contends that where the goods have come to a *losing market*, he ought to be called upon to make good *only* the difference between the value of the sound and damaged goods;—for so much, it is said, and no more, has the assured lost.

The answer to both these assumptions might be, in the words of Lord Mansfield, before quoted<sup>p</sup>,—"the underwriter has nothing to do with the price,"—the market being only used as scales to weigh the extent of the damage<sup>q</sup>. The comparison between the price of the sound and damaged goods is instituted only to ascertain the *quantum* of damage which the goods have sustained, *i. e.* the relative depreciation.

The principle contended for by the *assured* has been noticed by Magens,—who says<sup>r</sup>;

<sup>o</sup> Marshall, p. 623.  
<sup>p</sup> Vide supra.  
<sup>q</sup> Vide supra.  
<sup>r</sup> 1 Magens, p. 38. & ut sup. p. 90.

“the assured on a gaining market should bear his part for what did not pay a premium.” And it is allowed on all hands, that the assured ought not to call on the insurer for a loss on a larger sum than that on which the latter has received a premium.

Perhaps the principle for which the *insurer* contends, may have arisen in some measure from the customary mode (in my opinion not the best,) of stating a particular average ;—which, instead of estimating, by a comparison of the proceeds, how much the goods are depreciated in value, is done by making a statement in the rule of proportion,—*ex. gr.* If £500 (the sound value) lose £125, then £600 (the cost) will lose £150. Thus making it appear that the loss to the assured is only £125,—instead of showing that the goods are depreciated in value one-fourth, or 25 per cent. (1), which amounts to £150.

(1) There are three modes of stating a Particular Average, which are as follow :—

*First* :—(as above.)

If £500 lose £125 : then £600 will lose £150.

*Second* :—

As £500 (the sound) is to £375 (the damaged) so  
is £600 (cost) to £450.

From the invoice cost deduct      450

Amount of loss..... £150

But this point will now scarcely admit of dispute,—for it would appear to be completely settled, that if the goods be damaged, *i. e.* depreciated in value one-fourth, &c. the underwriter must pay one-fourth, &c. of the cost or value in the policy \*

\* 2 Bur. Rep. p. 1169.

Probably, however, this mode of adjustment may have arisen from the idea, that the assured has a right to call on the insurer in the one case; and the insurer has a right to demand of the assured in the other,—that the damaged goods shall be *replaced* with sound.

Now it appears clear, that if this were to be admitted as the principle of indemnity, it would do away at once all settled practice, and open a door to litigation on every partial loss of this nature that might occur.

Let us put the case of a *losing market* where the underwriter offers to replace the damaged goods with sound,—*ex. gr.* The merchant ef-

*Third :—*

Cost.....	£600
Amount of <i>pro-forma</i> sales of sound goods.....	£500
Ditto of sales of damaged goods.....	375
Damage, or depreciation in value 25 per cent.....	£125
25 per cent. on £600 is	£150.

The latter mode is I think preferable to either of the others, as serving better to elucidate the principle on which the claim is made.

fects insurance on a bale of cotton from the West Indies to London, valued at £20, which is the cost, &c. It arrives damaged, and if sound it would have been worth only £15. The underwriter offers to replace it with a sound bale;—but the merchant says, “no, the contract between us is, *that the goods shall come safe to the port of delivery; or if they do not, that I shall be*

‘ L. Mansfield, *indemnified to the amount of the prime cost, &c.*’  
2 Bur. Rep. p. 1172.

—it is a contract between the insurer and the assured, and not between merchant and merchant; a bargain and sale is a mercantile transaction, and has no principle in common with the contract of insurance. But further, if you mean by *replacing* the goods, to put yourself in my situation, you must make your purchase at the same market that I did, you must enter into a similar contract of insurance with a third person, (whose solvency you must guaranty) that the goods shall arrive safe.—You must in fact take upon yourself all the risks besides those in the contract between us, and bring the goods on to the port of discharge.—When you have done this, we shall be on a more equal footing.” If the merchant were thus to reply to the underwriter’s offer, he would at least have reason on his side—though the reply might not be satisfactory to the underwriter.

But finally, as no principle of adjustment can be correct unless it have a reference to the *market price*—so neither can any be so unless it have also a reference to the *prime cost*.

*Article 3. On the Adjustment of a Particular Average by a Comparison between the NEAT PROCEEDS of the Sound and Damaged Sales.*

There are several very material objections to this mode of adjustment (1), none of which appear to have had the attention that ought to have been given to them by the writers on the practice of insurance. Magens and Weskett were favourable to it, but upon what principle I am at a loss to discover, for the rule is incon-

(1) A very ingenious Essay on the subject of the adjustment of particular averages on the two principles of the *neat proceeds* and the *gross proceeds*, was published a few years since at Liverpool; wherein the author satisfactorily demonstrated, by a series of algebraical calculations, that the adjustment on the *gross proceeds* is the only mode that can be acted upon without involving the insurer in a loss of markets and freight and duties.

Two or three years previous to the perusal of that Essay, the writer had entered on a course of calculations which led to a similar result—and the only difference was, that his were made on Cotton from the United States, and those in the Essay alluded to are made on Sugar from the West Indies.

sistent with itself, if it profess merely to give the merchant his indemnity, by putting him "in the *same condition* which he would have been in if the goods had arrived free from damage."

Its operations are indeed so partial, that it does this only in the one solitary case of precisely a *saving market*. And the above writers, who are often very acute and accurate on other subjects, must, when they went into calculations on this, have given up the matter as hopeless, if they expected by the result to reconcile the interests of the assured and the insurer, or to give either of them satisfaction. Magens was indeed aware of this,—for he acknowledges that the rule will not admit of general application—and therefore proposes that the mode of calculation shall be varied with the state of the markets.

#### FIRST EXAMPLE.

##### *On a saving Market.*

If the goods had arrived <i>sound</i> , they would	
have produced.....	£600
Deduct freight and duties.....	100
	<hr/>
	500
Being <i>damaged</i> , the goods did produce.....	300
Deduct freight and duties.....	100
	<hr/>
	200
	<hr/>
Depreciation 60 per cent.	<u>£300</u>

In this example the goods are deteriorated only one-half, or 50 per cent.—which, on £500, is £250.—but the claim is 60 per cent. or £300.—The additional £50 make the amount of half the freight and duties; which half is lost by the goods being damaged in that proportion. It will be perceived that the result of this adjustment is the same as that made on the erroneous principle of a salvage loss<sup>a</sup>; for in both cases the underwriter pays the *balance* of account.

<sup>a</sup> Vide sup. art.  
1. ex. 1.

## SECOND EXAMPLE.

*Case 1. On a losing Market.*

<i>Pro-formâ</i> sales, if arrived sound.....	£350	
Deduct freight and duties.....	100	
	<hr/>	250
Being <i>damaged</i> , the goods did produce.....	£175	
Deduct freight and duties.....	100	
	<hr/>	75
Depreciation 70 per cent.	£175	<hr/>

*Case 2. On a gaining Market.*

<i>Pro-formâ</i> sales, if arrived sound.....	£850	
Deduct freight and duties.....	100	
	<hr/>	750
Being <i>damaged</i> , the goods did produce.....	425	
Deduct freight and duties.....	100	
	<hr/>	325
Depreciation 56½ per cent.	£425	<hr/>
1 2		

This example shows, without any comment, that the underwriter is by this mode of adjustment involved in the rise and fall of the market: for in both cases the true depreciation is the same, viz:—one-half,—and the freight and duties are the same in both.

But that the principle will not admit of general application, may be shown by analysing the two cases;—thus, we find, that on a *losing market* the merchant receives not only his *full* indemnity, but £50 more than he would have received if the goods had arrived sound, viz:—

He receives from the <i>damaged</i> sales .....	£175
And from the underwriter, 70 per cent. on £500.....	350
	<hr/> 525
If the goods had arrived <i>sound</i> , the gross pro- duce would have been.....	350
Add loss on the one-half supposed not to have arrived .....	125
	<hr/> 475
	<hr/> <u>£50</u> <hr/>

Thus, on a *losing market*, the merchant receives £50 more than the sum which would have put him in the *same condition* as if his goods had arrived sound.

In the second case, because the market is a *gaining one*, the merchant does not receive his full indemnity by £17, viz:—



# OR PARTIAL LOSS.

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If the goods had arrived <i>sound</i> , the gross produce would have been.....	£850.
He receives from the <i>damaged</i> sales.....	425
— Of the underwriters 56½ per cent. on £500.....	283
	<hr/> 708
Add profit on the one-half supposed not to have arrived.....	125
	<hr/> 833
The sum deficient of the merchant's full indemnity.....	<u>£17</u>

If we increase either the *freight and duties* or the *true depreciation*, the incorrectness of this mode of adjustment is the more strongly shown, viz:—

## THIRD EXAMPLE.

*Case 1. On a losing Market, of 50 per cent. (as before) let the freight and duties be INCREASED TO £250.*

Then, <i>Pro-forma</i> sales, if arrived <i>sound</i> .....	£500
Deduct the freight and duties.....	250
	<hr/> 250.
Being <i>damaged</i> , the goods did produce.....	250
Deduct the freight and duties.....	250
	<hr/>
The loss is total, or 100 per cent.	

*Case 2. On a losing Market, of 75 per cent.  
let the goods be DETERIORATED TWO-THIRDS,  
and the freight and duties be, as in the last  
case, £250.*

Then, <i>Pro-formâ</i> sales, if arrived sound.....	£375	
Deduct the freight and duties.....	250	
	<hr/>	125
Being <i>damaged</i> , the goods did produce.....	125	
But the freight and duties amounting to £250 are double the proceeds.—		
The loss in this case is, therefore, 200 per cent.		

Thus, we find, by increasing the freight and duties to £250 (all the other *data* remaining as before,) the loss is total, or 100 per cent. though the goods are damaged only *one-half*. And if, in addition to this, we assume the goods to be damaged two-thirds, and the market to be a losing one of 75 *per cent.*—the loss is 200 per cent.

There are instances of the freight and duties amounting to seven or eight times the value of the goods;—let us then *imagine*, (for the case is too absurd to be reduced to writing,) what would be the result, if these charges were increased to £2000 and the market and degree of deterioration were the same as in the last case!

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Thus, therefore, this mode of adjustment is in all cases erroneous:—in most cases inconsistent with what it professes to accomplish;—and in some cases absurd and impracticable.

And, *first*, it is erroneous.—Because, even on a saving market (the only case where it is consistent with itself,) it involves the underwriter in a loss of the *freight and duties*; which are charges incurred and paid by the merchant *after* the contract was entered into. These charges also are the effect of mercantile operations; certainly, they must be incurred before the goods can be brought on the port of discharge, and placed in the market for sale, and the cost of the goods is increased to the merchant, by so much as is paid for them;—but the question is,—is the underwriter's risk to be increased thereby? He receives a premium on the amount of the *first-cost* of the goods, to indemnify the merchant against any damage which may happen to them;—and it has been said, speaking of a total loss, (and it will equally apply to a partial loss,) “the insurer engages so far as the amount of the prime-cost or value in the policy, that the thing shall come safe:” that is,—“the value of the thing he insured at the *outset*.. He has no concern in any subsequent value.” This may be considered as an answer to the argument, that the freight and duties being lost in con-

L. Mansfield.

2 Bur. Rep.

1170.

sequence of the sea-damage, the insurer is, consequently, liable to pay them.

*Secondly*,—this mode of adjustment is inconsistent.—For while it necessarily involves the underwriter in the fluctuation of the markets, (and of course in the speculations of the merchant,) by professing to grant the merchant a full indemnity for his goods having arrived in a damaged state,—it effects this only in one instance, viz :—precisely a saving market.—On a gaining market, (with the *data* in section III.) the indemnity is not complete, while on a losing market, the merchant is put in a better condition than if his goods had arrived sound.

*Thirdly*,—this mode cannot be acted on generally.—Because cases may occur where it would be highly absurd to expect the insurer to indemnify the assured for his loss.

*Article 4. On the Adjustment of a Particular Average by a Comparison between the GROSS PRODUCE of the Sound and Damaged Goods.*

It will appear evident, that the three former modes will not admit of general adoption.

It has been seen that the *first* mode is objectionable,—because, by not having a reference to the *markets*, there are no means of ascertain-

ing the extent of the deterioration, nor of indemnifying the assured. On the *second* mode, by having no reference to the *prime-cost*, the demand on the underwriter (for no *quantum* of damage can be made out, because no relative depreciation is established,) must entirely depend on the state of the markets, and, in consequence, on the speculations of the merchant. To the *third* mode, though it has indeed a reference to both the *markets* and the *prime-cost*, the objections have just been detailed.

The *desideratum* is,—to obtain an uniform measure, or standard of adjustment, which can be made generally useful; and the result of which will be the same, whether the markets rise or fall, or whether the charges are increased or diminished;—and which, while it affords that indemnity to the assured to which he is fully entitled, does not subject the insurer to those claims with which, agreeably to his contract, he has no concern.

The following examples will show that this end may be obtained by an adjustment on the *Gross Proceeds* of sale. But first let it be admitted,—as it is imagined it must be by every intelligent man conversant with the true principles of insurance,—that the underwriter only insures the physical safety of the commodity, and of course agrees to pay only the

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amount of the physical damage it actually

<sup>w</sup> Vide infra, art. sustains <sup>w</sup>.  
8.

<sup>x</sup> Vide Appen-  
dix ii.

### FIRST EXAMPLE <sup>x</sup>.

(On the *data*, p. 101.)

	Market.		
	Saving.	Losing.	Gaining.
<i>Pro-forma</i> gross produce of sound sales	£600.	350.	850.
Gross produce being <i>damaged</i> .....	300.	175.	425.
Depreciation 50 per cent.	£300.	175.	425.

### SECOND EXAMPLE.

Let all the *data* be altered ;

*e.v. gr.*—INCREASED.

INTEREST.....	£750
DETERIORATION..	three-fourths
CHARGES.....	£200
Loss, on a losing market..	} £75 per cent. on the Interest.
PROFIT, on a gaining market..	

Then the adjustment will be as follows:—

	Market.		
	Saving.	Losing.	Gaining.
<i>Pro-forma</i> gross produce of sound sales..	£950 : 0 : 0.	£387 : 10 : 0.	£1512 : 10 : 0.
Gross produce being <i>dama-</i> <i>ged</i> .....	237 : 10 : 0.	96 : 17 : 6.	378 : 2 : 6.
Depreciation 75 per cent.	£712 : 10 : 0.	£290 : 12 : 6.	£1134 : 7 : 6.

## THIRD EXAMPLE.

Let all the *data* be altered again ;

*ex. gr.*—DECREASED.

INTEREST.....	£250
DETERIORATION.....	one-fourth
CHARGES.....	£50
Loss, on a losing market.....	} £25 per cent. on the Interest.
PROFIT, on a gaining market.....	

Then the adjustment will be as follows :—

	Market.		
	Saving.	Losing.	Gaining.
<i>Pro-formâ</i> gross produce of sound sales..	£300 : 0 : 0.	£237 : 10 : 0.	£362 : 10 : 0.
Gross produce being damaged.....	225 : 0 : 0.	178 : 2 : 6.	271 : 17 : 6.
Depreciation 25 per cent..	£75 : 0 : 0.	£59 : 7 : 6.	£90 : 12 : 6.

Let the *data* be the same as in the third example in the preceding article<sup>7</sup>.

<sup>7</sup> Vide sup. art. 3.

## FOURTH EXAMPLE.

## Case 1.

<i>Pro-formâ</i> gross produce of the sound sales. ....	£500
Gross produce, being damaged.....	250
Depreciation 50 per cent.	£250

*Case 2.*

<i>Pro-forma</i> gross produce of <i>sound</i> sales.....	£375
Gross produce, being <i>damaged</i> .....	125
	<hr/>
Depreciation 66½ per cent.	£250
	<hr/>

Thus, this rule is shown to be simple in its operations and uniform in its result.

\* *Week. 24.*

But it has been asserted that “in cases where the charges should exceed the gross produce, the assured would always receive short of a total loss, notwithstanding he had paid a premium to be fully indemnified.” In reply to this, let us put the following case:—A merchant effects insurance on two kinds of goods, on the one the charges are, as usual, considerably less than the value of the goods, on the other they are considerably greater; both parcels arrive in bulk, but wholly damaged and spoilt for all purposes whatsoever;—then, “why,” it may be asked,—“is not the assured entitled to claim a total loss in the one case as well as in the other?” The assertion seems grounded on the assumption, either that the goods are not wholly damaged, or that goods which were before so damaged as to be totally worthless, are rendered intrinsically of value by certain charges having been paid on them. Or it may be meant, that



the merchant would always receive short of a total loss, (*quoad* him,) *i. e.* less than his full indemnity *after he had paid the freight and duties*;—which is admitted. But it is asked, in return, of the advocates for an adjustment on the basis of the neat proceeds,—“if, in the case of goods being *wholly damaged*, the underwriter be called upon to pay no more than a total loss, or a *hundred* per cent. on his subscription; why, if the goods be partially damaged, *ex. gr.*, *one-half*, should he be expected to pay a greater proportion than *fifty* per cent. (*i. e.* *one-half*) of his subscription? All these anomalies arise from not bearing in mind, that the insurer only guaranties the *safe landing* of the goods, and that there *his risk ends*. (1)

(1) It is very material to recollect this in the adjustment of claims for particular average. *The insurer's risk ends on the landing of the goods*. If the goods be sea-damaged it is on the *landing* therefore, and then only, that the true depreciation in value, as affects the insurer, can be ascertained. And if there be no market for such goods at the time; or the consignee does not choose to sell them; or, as at some foreign ports it frequently happens, if he suffer them to remain in the custom-house till it suits his convenience to pay the duties and take them out;—in all of these or similar cases the insurer is to be borne harmless. He in the words of the policy,—only insures the goods “from the loading thereof aboard the ship until the same shall be discharged and safely landed.”

It will appear evident to any one in the habit of calculations of this kind, that if the freight and duties were *ad valorem*, there would no longer be any difference of opinion between the assured and the insurer,—for the *result* of the adjustment on the *net proceeds* being then the same as on the *gross proceeds*, it would be immaterial which principle was adopted :—for if an equal proportion be taken from unequal sums, the remainders will bear the same proportion to each other as the gross sums did before the deductions were made. (1) It is indeed, solely in consequence of the freight and duties being the same, or nearly the same, on the damaged as on the sound goods, or by their not being proportioned on each, that on the *net proceeds* the insurer is made to pay the whole or a part of them; and that on the *gross proceeds* the assured does not receive his full indemnity.

(1) This serves to show the uselessness of deducting the *discount* (as is customary) from the sound and damaged sales, when it is the same *per centage* on both; but which is only necessary when the discount differs on sales by auction from those by private contract. From this, and other instances, which might be given of circuitous modes of calculation, we may infer that much time and trouble would be saved to all parties if a little more attention were paid to the study of first principles, and to their bearings on the subject before us.

On an attentive perusal of the foregoing pages, it will be found, that the mode of adjustment considered in this article is peculiarly adapted to claims for partial loss on goods sea-damaged;—not only from the simplicity of its operations, but from its being divested of all the objections made to those treated of in the former articles;—there can indeed be only one objection to it, which is, that it does not put “the merchant in the *same condition* which he would have been in if the goods had arrived free from damage,”—but that, it only indemnifies him against any injury which the goods may sustain by their being depreciated in value in consequence of sea-damage;—which is saying, in other words,—that “the contract of insurance does not afford, *what it was never intended it should afford*,—A MERCANTILE INDEMNITY.”

*Article 5. Of the ASSURED'S INDEMNITY when the Adjustment is made on the Gross Proceeds.*

As it has been seen that the merchant cannot obtain his full indemnity by that mode of adjustment which is stated to be the only correct

one, it may be expected that something should be said on the remedy which he ought to have from some other source.

On this subject, it is to be regretted that, as far as regards the present practice, nothing satisfactory can be said. But as both parties are now well acquainted with the principle of adjustment, there will be no disappointment on that head.

The loss that the merchant sustains on a *saving market*, (and with no other will it be contended that the underwriter has any concern,) is the *freight* and *duties* on that part of the value of the goods which is supposed not to arrive in consequence of its being deteriorated in value. The *landing charges* being comparatively very small, are not noticed.

With regard to the *freight*,—that may be claimed on delivery of the goods; and however much they may be depreciated in value by sea-damage, the full sum must be paid for freight according to agreement.

The ordinance of Amsterdam, which, it has been noticed, particularly recognises the principle of the *gross proceeds* in the adjustment of losses of this kind, provides a mode, by which the merchant may indemnify himself against any loss from this source;—it allows the shippers or

consignees to insure the freight which must be paid in the case of a safe voyage; (*i. e.* of arrival) with the condition, that the underwriters shall “pay only the estimate of the average fallen on the goods, and no more, and in case of a total loss returns may be demanded from him who has insured on the freight.”

These latter words appear to mean, as they are explained in the rules established afterwards by the Department of Insurance in the same city,—that “in case of total loss, the freight and usual charges having not been paid, the underwriter’s risk shall be forfeited, (*i. e.* given up,) save a half per cent., which is allowed to him.” <sup>*Rules of the Dep. of Ins. R. 35.*</sup>

The loss of *duties* ought certainly to be made good to the merchant by the revenue; and this principle is acknowledged to be correct, because on his application and after some delay, a return is made to him; but this return, though it should be in proportion to the degree of deterioration, generally falls short of his loss.

Though the return of duty, however, makes part of the merchant’s indemnity, it being part of his loss, in consequence of his having paid the full duty on the damaged goods; it has been contended, because the gross produce includes the duty, that the underwriter is entitled to this sum, or that it should be considered in the ad-

justment of the claim ;—otherwise, it is said, the merchant would be a gainer by the goods being damaged. But it has been seen, that it is by the adjustment on a comparison of the gross proceeds of sale, and by that alone, that the underwriter has no concern with the duties. The return of the duty ought therefore to be made good to the merchant ; he having paid the duty and borne the loss. On the assumption that the merchant were fully indemnified against *all loss*, by the underwriter, from the arrival of the goods in a damaged state, it is admitted, that he would be a gainer of the sum in question.

If an adjustment had been made on the basis of the *net proceeds*,—when the merchant received a return of part of the duty, he ought to pay it over to the underwriter ; and he might safely pay the whole sum, for it would rarely, if ever happen, on such an adjustment, that a greater proportion had not been already received of the latter.

\* Lord C. J.  
Ellenborough.

It has been suggested by high authority\*, that if the merchant mean to be indemnified against the loss of the freight and duties, and the loss on the goods arriving damaged at a profitable market, he may insure against such loss, by valuing his goods in the policy at the

expected market price,—“or by stipulating, that in case of loss, it shall be estimated according to the value of like goods at the port of delivery<sup>b</sup>. But this mode it is submitted cannot be recommended,—because if there were no other objections, it would be paying a premium on the *whole* amount of the freight, duties, and expected profit, (which sometimes amount to very considerably more than the goods themselves,) to insure against the contingent event of the loss of a part. With respect to the *freight*, a question occurs,—whether the merchant having no direct interest in it, he not having paid it in advance, can legally insure it<sup>c</sup>? (1)

<sup>b</sup> 12 East's Rep.  
639.

<sup>c</sup> 5 Term Rep.  
709.

(1) The rules of the Amsterdam Insurance department, before quoted, provide against any loss to the merchant from a settlement of the claim on a comparison of the *Gross Produce*, as follows:—

“The loss or average befallen merchandise by any unforeseen accident during the voyage, or after arrival at the place of its destination, must be borne by the gross capital, in proportion to the value at which such goods might otherwise have been estimated. Though, on the other hand, the shippers, owners or consignees are allowed to insure for the amount of damage they are liable to sustain from the merchandise thus averaged, and also for *all customary charges* as when such merchandise were arrived safely in good condition, by which the underwriters on this insurance are held responsible for the rate *per centage* on their respective sums that the consequences of any loss or average shall amount to. And where in case of total

*Article 6. Of the EXTRA CHARGES, arising from the Sale of the Damaged Goods.*

Though there has been much difference of opinion on the underwriter being liable to a loss

loss the freight and other usual charges may not have been paid, the underwriter's risk shall be forfeited, save a half *per cent.* which is allowed to him\*." That is, he shall return the premium, less a half *per cent.*

In Spain, it is customary, and according to law, to deduct from the *freight* the amount of average on goods shipped in Spanish America. In consequence of this, insurances on goods from those ports, are in fact, free of particular average. I am not aware how it would be regulated, in case the loss on the goods exceeded the value of the freight.

The Essay before mentioned, (which appeared at Liverpool a few years ago,) suggests a remedy to the merchant for the loss of freight in a settlement on the gross pro-

\* As a matter of curiosity, I give a list of the documents required in Amsterdam for regulating any loss or average, viz :

- " 1. The protest of the ship-master and the crew.
2. Attested copies of officers' fees and other charges at the Admiralty office.
3. Attested copies of the deed for empowering the inspectors, (surveyors)—and of their fees.
4. Account of sales of the merchandise averaged.
5. Account of extra charges, not included in the account, No. 2.
6. Bills of lading ; to prove the cargo to be the same as insured.
7. Original invoice ; proving the insurance not to have exceeded the value of the goods insured ; for where imaginary profit is insured the same must be intimated to the underwriters, and stated as such in the policy, otherwise it becomes invalid."



of the freight and duties, (*i. e.* the *ordinary charges* on the goods) and the consequences incurred by involving them in the adjustment, there appears to have been no dispute as to his liability to the *extra charges*.

These charges are incurred by the goods being damaged, and by their consequent sale by auction; this mode of disposing of the damaged goods being adopted as the best, and perhaps the only means of ascertaining their real value. It may, it is true, be customary to sell the same species of goods (*ex. gr.* colonial produce,) when arriving sound, by public sale; but as there is no *obligation* on the merchant to dispose of them in this way, it is proper that the charges on the damaged goods should form a part of the loss.

Two modes have been adopted in apportioning these charges; the result of which in some cases makes a material difference to the parties.

It appears, from the manuscript copies of adjustments, before alluded to, that the mode in general use was, to deduct the extra charges

ceeds,—by proposing that the owner of the ship should allow that proportion to the merchant, and demand the same of the underwriter on the freight. This appears to be the most equitable mode of indemnifying the assured against a loss of this kind.

from the amount of the damaged sales before the *quantum* of loss was ascertained. The question then occurs,—whether the insurer (assuming the property to be fully insured,) shall pay more or less, according to the goods coming to a losing or a gaining market; or whether he shall in all cases pay the amount of the charges,—neither more nor less?

On analysing the principle of the charges being deducted from the damaged sales we shall find the effect to be as follows:—

*First*,—on a *profitable market* the insurer pays only such a proportion of the charges as the amount of the sound value is proportional to the amount of the interest;—*e.x. gr.* Let the value, if the goods had arrived sound, be £1000, and the interest at risk be £500—no matter in what degree the goods are deteriorated;—the insurer will then pay only *half* the extra charges.

But *secondly*,—on a *losing market*—let the amount of the interest be £500, and the sound value only £250, and the insurer will then pay *twice* the amount of these charges.

*Thirdly*,—there is but one case, on this mode of calculating, where the insurer pays the *precise amount* of the extra charges—*i. e.* when the amount of the interest is the same sum as the

gross proceeds of the sound goods ;—which is of course less than a saving market.

No other principle will therefore bear general application, than that of adding the extra charges to the amount of the partial loss itself, and apportioning the whole on the interest,—which is the present mode of adjustment.

*Article 7. Of the Mode of adjusting a PARTIAL LOSS, (properly so called) on Goods.*

The mode of adjustment hitherto treated of is, a pecuniary loss to the assured, in consequence of the merchandise insured being *deteriorated* in value by sea-damage. A partial loss, properly so called, is a total loss of a part of the interest:—*ex. gr.* in an insurance on twenty hogsheads of sugar if one be *washed out*, that is called a partial loss.

On the mode of adjustment of this kind of loss there is no difference of opinion;—the amount lost must be paid for at the prime cost, or the value in the policy. Because the goods never having arrived, no reference can be had to the market price at the port of discharge; that being resorted to merely to ascertain the *quantum* of damage. Whenever there is a total loss of any *part* of the interest it must be settled in the same manner as a total loss of the *whole*.

When a partial loss and a particular average both occur on the same interest,—the most correct practice is to adjust them separately; but it may be proper to observe that this is not absolutely necessary. For, from the amount of the interest being the basis of the insurer's liability, and the market only applying to the part deteriorated, the result is precisely the same, whether they are involved together or separated.

This case could not escape the quick-sightedness of *Magens*, who gives an illustration of it in his very useful work on insurance<sup>d</sup>.

An example may not be improper here to show the truth of the above observation.

Let all the *data* be the same as assumed in page 99, and let the interest be 20 hogsheads of clayed sugar;—10 of which are *deteriorated* in value, and the other 10 *washed out*.—

*Case 1. The Particular Average and the Partial Loss adjusted together.*

Amount of interest .....	£500.
<hr/>	
20 hogsheads, if arrived <i>sound</i> , would have produced .....	600
10 hogsheads, arrived <i>damaged</i> , did produce.....	150
<hr/>	
Loss and depreciation in value, 75 per cent.....	£450
<hr/>	
£500, (amount of interest,) at 75 per cent. ..	£375
<hr/>	

*Case 2. The Particular Average and the Partial Loss adjusted separately.*

*First. The Particular Average*

on 10 hogsheads damaged:—

If they had arrived <i>sound</i> , they would have produced .....	£300
But being <i>damaged</i> , they did produce.....	150
	<hr/>
Depreciation in value 50 per cent. ....	150.
	<hr/>
£250, (amount of the interest damaged,) at 50 per cent. ....	£125.

*Secondly. The Partial Loss*

of 10 hogsheads washed:—

The value of 10 hogsheads (half the interest)....	250
	<hr/>
As in <i>Case 1</i> .	£375.
	<hr/>

It may be useful to notice here, that though by a particular average and a partial loss being adjusted together, the result is the same as on a separate adjustment of each:—Yet it is far from being so in the case of a particular average, where various articles are blended together in one statement.

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## EXAMPLE.

*First:—*

An Adjustment of a Particular Average of  
*several Articles* TOGETHER:—

10 hogsheads of Sugar, valued in the policy, at	£250.
10 bales of cotton, ..... ditto.....	£300.
10 casks of coffee, ..... ditto.....	£150.

Interest insured £700.

Depreciation in value:—

If the said goods had arrived sound, they would have  
produced as follows:—

The Sugar .....	£500
The Cotton .....	100
The Coffee .....	250
	<u>£850</u>

Being damaged they did produce:—

The Sugar .....	200
The Cotton .....	25
The Coffee .....	50
	<u>275</u>

Depreciated in value 67,647 per cent. £575.

Claim, viz. £700

(amount of interest,) damaged 67,647 per cent. is  
£473 : 10 : 7.

*Secondly:—*

An Adjustment of a Particular Average of  
*several Articles* SEPARATED.

1. On 10 hogsheads of Sugar, viz.

Value as above..... £250.

Difference between the sound and damaged

sales of Sugar as above ..... £300.

Depreciated in value 60 per cent.

Claim, viz.

£250 (amount of interest) damaged 60 per cent. £150

2. On 10 bales of Cotton, viz.

Value as above..... £300.

Difference between the sound and damaged

sales as above ..... £75.

Depreciated in value 75 per cent.

Claim, viz.

£300 (amount of interest) damaged 75 per cent. £225

3. On 10 casks of Coffee, viz.

Value as above ..... £150.

Difference between the sound and damaged

sales as above ..... £200

Depreciated in value 80 per cent.

Claim, viz.

£150 (amount of interest) damaged 80 per cent. £120

£495

Therefore, the total claim by involving the whole in one adjustment is £473 : 10 : 7., but, by making separate adjustments, it is £495 : 0 : 0., which is the sum that ought to be paid by the insurers. (1)

*Article 8. On the Selling WHOLE PACKAGES of Goods, when only PART is damaged.*

It may perhaps be expected, that something should be said on the subject of selling whole

(1) N. B. This is on the assumption that average is to be paid separately on each species of goods<sup>e</sup>.

<sup>e</sup> Ut inf.  
P. IV. art. 3.

packages of manufactured goods, when only a few pieces or articles in each are damaged. This is customary in the United States, at Leghorn and other ports in the Mediterranean, &c. (1)

If the damaged goods were lotted separately from the sound, and the sale were as fairly conducted as if the underwriters had nothing to do with it, and a *bonâ fide* sound price of the damaged goods could by these means be obtained, —this mode of selling the damaged and sound goods together would make no difference, (2)

(1) There is a strange custom at Quebec and some other transatlantic ports,—that if, on the survey of a package it is supposed to be damaged *five* per cent. or upwards, the whole is sold “on account of the underwriters,” as it is called—if under *five* per cent. the consignee takes the goods to account.

(2) The following example will show, that on the above principle, the sound and damaged goods being sold together can make no difference to the underwriter.

*Example.*

*Interest.* One trunk containing 50 pieces of  
printed calico, valued at..... £300.  
*Damaged.* 25 pieces which sold for ..... £50.  
*Sound.* 25 pieces which sold for ..... £100.

*First Statement :—*

If sound the 25 p <sup>s</sup> . would have produced ....	100
But being damaged they produced only ....	50
	<hr/>
The damage is 50 per cent on 25 pieces ..	<u>£50</u>



and nothing need be said on the subject. But the fact is, that in advertising such sales, a few unmeaning words are made use of,—such as “to be sold *on account of* the underwriters;” or “*for the benefit of* the underwriters,”—and in consequence the goods are often sold at a lower price than their real value.

The reason given by the merchant for selling the whole package is,—that by some of the pieces being damaged the *assortment* is broken and rendered unsaleable, and thus the value of the whole is lessened to him. In reply to this, let it be asked—what is there in the policy that subjects the underwriter to a loss proceeding from such a cause?—If he is to pay for the breaking of an assortment he ought to have been consulted in the making of it. And if he were to be liable to a loss on the sale of the sound goods, *because* the merchant sustains

*Second Statement :—*

If sound the 50 p<sup>s</sup> would have produced .... 200

But 25 p<sup>s</sup> being damaged, they produced only 150

The damage is 25 per cent. on the 50 pieces £50

On the *first statement* 25 p<sup>s</sup>. valued at £150, damaged  
50 per cent. is £75.

On the *second statement* 50 p<sup>s</sup>. valued at £300, damaged  
25 per cent. is £75.

a loss on them from the effects of a peril of the sea; he might, perhaps with equal propriety, be called upon for a loss from a fall in the markets, *because* the ship was detained on the voyage, (from having sprung a leak, and put into a port to refit,)—for this loss is also an effect of a peril of the sea.

But the most satisfactory reason why the underwriter is not liable is, (as it has been noticed in the preceding articles,)—because he is accountable only for the actual damage done to the thing insured.—He engages to guarantee the assured against the *direct operation* of sea-damage, but not against the *consequential re-*

<sup>1</sup> 2 Valin Com. *sults* <sup>1</sup>.  
p. 104.

CHAPTER III.

OF PARTICULAR AVERAGE,

OR

PARTIAL LOSS

ON SHIPS.

---

WHAT in itself constitutes a partial loss, it has been observed<sup>a</sup>, is not a matter of any doubt, <sup>a</sup> Millar, 329. but in what cases the *insurer* shall be liable to it, is not precisely determined. The line between a loss occasioned by the wear and tear of the voyage, which falls on the owner, and the damage done to the ship by extraordinary accident, for which the insurer is liable, is not distinctly drawn either by the law<sup>b</sup>, or the practice of insurance. <sup>b</sup> Marshall, 492. We are obliged therefore from experience to form our judgment on this subject.

The French writers<sup>c</sup> admit claims for partial <sup>c</sup> Valin, *Com. sur Ord. Louis XIV.* art. 29. loss which we should in part reject, and consider <sup>d</sup> Pothier, *Tr. d. Cont. d' Ass.* They say, <sup>e</sup> c. i. § 3. n. 66. that if by some extraordinary accidents,—as the <sup>f</sup> Emerigon, c. xii. § 9. art. 3. violence of the winds or waves,—it become ne-

cessary to slip a cable, or a cable be broke, and an anchor lost, or a sail or yard be carried away, it forms a claim for a partial loss.

The ancient as well as modern authorities agree, when treating of general average, and this will equally well apply to a partial loss,—that if a mast be sprung, or a sail be split, or a cable be chafed by the rocks, or the stock or fluke of an anchor be broken off,—such is considered as the wear and tear of the voyage, (or as the things used in the prosecution of it,) and however great in some cases the hardship may appear, the owner alone must bear the loss.<sup>d</sup>

<sup>d</sup> *Leg. Rhod.*  
2. 1.

*Leg. Oler.*  
art. 9.

*Leg. Wisb.*  
art. 12.

Valin, Poth.  
Emer. ut sup.  
Wellwood, tit.

17.

Abbott, p. iii.

c. 8. § 7.

This is illustrated by the following simile:—a ship is like a tool in the hands of a workman in his trade;—if in doing his work he break his hammer, his anvil, or any other instrument, he can claim no satisfaction from his employer. And the reason is obvious,—all appurtenances belonging to a ship ought to be made of the best materials, and strong enough to hold good and resist any force of ordinary gales of winds and heavy seas in the course of the voyage. *Magens* says, “were insurers obliged to pay for every rope that breaks, or every sail that splits, or mast or yard that is sprung, they and not the owner would keep the ship in repair, and there would at length be no

other way of insuring ships but free of particular average." Every cutting, it has been shown<sup>f</sup>, does not make a claim for general average; nor does every loss of masts and sails at sea constitute a claim for a partial loss. 1 Magens, 52.  
Videsupra, c. 1.  
§ 1. art. 1. [iv.]

I proceed now to state those cases which are generally considered as coming under the head of PARTIAL LOSS.

[I.] THE DAMAGE DONE TO A SHIP *when FORCED ON SHORE by the wind and sea; or by any fortuitous accident.*

This requires no comment. But it may be remarked that if it be determined that the damage done to a ship by *purposely* running her on shore, as noticed under a former head<sup>g</sup>, is not a case of general average, then that must also come under this head. Vide supra,  
c. 1. § 1. art. 2.  
[a.]

[II.] THE DAMAGE *occasioned on BEING RUN FOUL OF by other vessels, or by unavoidably RUNNING FOUL OF another ship.*

There are long articles in the foreign authors<sup>h</sup> on this subject which it would be useless to quote at length; they being however some authority for us, we ought not to pass them over in silence.—Roccus says, "If damage be done to a ship or goods by the act or fault of a third Leg. Rhod. 9.  
2. 29.  
Leg. Oler.  
art. 14.  
Leg. Wisb.  
art. 26.  
Valin, Com. sur  
Ord. Fr. tit.  
"Av." art. 11.  
Bynk. quæst.  
jur. priv. L. iv.

c. 18, &c.  
 Roccus de  
 Assoc. Not.  
 xxvii. n. 86,  
 87, 88, who cites  
 Santerna de  
 Assoc. p. iv.  
 n. 80, 81.  
 Pothier, Tr.  
 d' Ass. c. 1. § 2.  
 art. 1. no. 50.

person, the assured may proceed at law against him for the damage, which was occasioned by his fault. But if *he* will not proceed against him,—who is bound to do so? Certainly, the insurer: he being liable to such damage. Should the assured however proceed against such third person he would not prejudice his interest with the insurer, so far as to disable him from having recourse to the latter, in case the person who committed the injury should be found insolvent; because the assured having paid the price of the risk to the insurer, he is answerable not only *in subsidium*, but *principaliter*<sup>i</sup>.”

<sup>i</sup> Roccus de  
 Assoc. ut supra.

Pothier, under the head “*Abordage*,” says, “the insurer is bound to indemnify the assured where the loss happens by a fortuitous event,—as a tempest, or even where it has happened through the fault of the master of the other vessel;—in which case the assured gives up his right of action to the insurer<sup>h</sup>.”

<sup>h</sup> Pothier, Tr.  
 d' Assur. ut sup.

But if the master of the ship insured, from negligence run foul of another ship, and thereby damage his own, such damage ought not to constitute a claim for a partial loss,—“the insurer being considered,” as is observed by Valin, “only accountable for the unforeseen accidents of the voyage<sup>i</sup>,” and an accident is not that

<sup>i</sup> Valin, Com.  
 12. 14. 74. 79.

which happens through the act or fault of the proprietor, or his agent or servants. Mr. Serjeant Marshall, in his very useful work, says, "the mistakes, ignorance, and inattention of the master or mariners are not perils of the sea. But if the damage happen from bad intention and the wilful misconduct of the master, &c.—this it is thought would amount to barratry<sup>m</sup>." According to the French writers<sup>n</sup>, barratry includes the negligence of the master and crew. But with us there must be a fraudulent intention, whereby the owner is injured, to constitute barratry. Therefore it appears, if a loss happens from the negligence or unskillfulness of the master or the crew, there can be no claim for partial loss.

From all that has been written and said on the subject of *collision*, it may be inferred, that where there is no proof of negligence in the master or crew of the damaged ship (and negligence, like fraud, cannot be assumed,) the insurer is liable for the damage, and he cannot oblige the owner to sue the other party. But if he indemnify the owner he becomes vested in his rights, and *he* may sue the party who was wilfully the cause of the damage<sup>o</sup>.

<sup>m</sup> Marsh. p. 493.  
<sup>n</sup> 6 Term Rep.

656.

<sup>n</sup> Valin, Com.

sur Ord. art. 37,

28.

Poth. Tr. Con.

d' Ass. c. i. § 3.

no. 65.

Emer. tom. i.

371.

Le Guidon,

c. 15. art. 4.

<sup>o</sup> 5 Rob. Adm.

Rep. 345.

[III.] *The DAMAGE done to a ship's UPPERWORKS; to the BOATS, &c. by the force of the wind and sea.*

Some well-informed persons in Lloyd's hold, that this is in general the wear and tear of the voyage; but the custom is to consider it as a partial loss on the ship for which the underwriters are liable.

[IV.] *BOATS washed overboard.*

It seldom happens that boats, if properly lashed to the quarters, or to the ringbolts on the deck, are forced away by the violence of the sea. This may however occur in storms or hurricanes. If a boat, when hung to davits over the ship's stern, be carried away by the sea, it is not customary to make the loss a claim on the insurers; (1.) that being considered an insecure place for the boat<sup>p</sup>. Some writers have gone so far as to hold, on the authority of the laws of Rhodes, that the boat is not part of the ship nor of its apparel<sup>q</sup>. It is not necessary for us to enter into this discussion, because it is now well understood that the boat is as much a part of the ship (when put in a secure place), as far as regards the insurers, as the masts and the sails

<sup>p</sup> Vide supra, 16.

<sup>q</sup> Dig. 21. 2. 44. 6. 3. 1. Roccus, n. 20. Stracca, p. 2. no. 12.

(1.) For some just observations on the boat being outside of the ship, see Q. van Weytsen, *Tr. des Av.* p. 11.



—if indeed nothing but what was attached to the ship were allowed to belong to it, then the cables and anchors might as well as the boats be excluded.

[v.] *Losses happening from LIGHTNING ; or from the ship being ACCIDENTALLY set on fire.*

The insurers are bound to pay a loss of this nature in consequence of a fortuitous event ; but the French writers say, that if it happen from the negligence or fault of the master and crew they are not bound,—unless there be a clause in the policy to that effect :

Pothier, C.  
d' Ass. c. 1. § 2.  
art. 2. n. 53.  
Emer. c. xii.  
§ 41. n. 13.

[vi.] *Losses incurred while a Ship is SCUD-DING before the wind, or while she is LYING-TO the sea.*

Such losses are said to come under the head of partial loss, because at such times the master and seamen have no command over the ship. And for the same reason, if in a heavy-cross-rolling sea, the vessel pitch, or roll away her masts ; such loss may, it is said, be attributed to unforeseen, and unavoidable accident ;—if it do not arise from insufficiency, or from proper care not having been taken to guard against the effects of the sea.

\* Q. van Weyt.  
Tr. des Av. 17.

[VII.] PLUNDER<sup>\*</sup> or DAMAGE *done to a Ship and her Stores* IN CONSEQUENCE OF CAPTURE.

An instance seldom if ever occurs, where a ship is for any length of time in possession of the enemy, that the sails and rigging escape damage, from the neglect of the captor's crew. The re-captors also often occasion as much damage as the crew of the enemy. There can be no doubt I imagine that these, as well as plunder, and the extra consumption and waste of the ship's stores and provisions, are partial losses for which the insurers are liable. (1)

[VIII.] DAMAGE *done to a Ship* BY DEFENDING HER AGAINST AN ENEMY.

This subject has been already noticed under another head<sup>†</sup>, where it was observed that if the ship be an "armed ship," so called, *i. e.* carrying a letter of *marque*—she is bound by a kind of implied warranty, to defend herself. One of the great objects indeed in arming, is to make

\* Ut sup. P. 1. (1) In the former part of this essay it has been shown<sup>u</sup>, c. 1. § 2. art. 2 & 3. that the provisions are not connected with the freight, which some persons have assumed; but being the ship's stores, are part of her outfit, and therefore insurable as

<sup>v</sup> Marshall, 623. such<sup>v</sup>.

quicker voyages—and thereby more profit to the owners; freights are also more readily obtained—and the premium given on goods is lower, in consequence of the idea of increased safety;—therefore the damage done to the ship should be considered as the wear and tear of the voyage. If an ordinary merchantman however, be attacked by an enemy and defend herself, and thereby escape capture, the damage done appears to me to come under the head of a peril arising from the enemy, and in consequence that it is a partial loss for which the insurers are liable. But there are men of information in Lloyd's who are of a different opinion, and who on the principle that whatever is ultimately for the general benefit ought to be made good by a general contribution, consider this to be a subject of general average. If the ship should not escape capture, but be afterwards re-captured, still I imagine the damage done should be recoverable as a partial loss,—if it were only as an encouragement to owners of ships to order their masters to defend the vessels entrusted to their care.

[IX.] *Sails split and Masts sprung* BY CARRYING A PRESS OF SAIL to escape capture, or when on a lee-shore.

According to the erroneous ideas of many persons, and particularly foreigners, it is thought that the damage arising from carrying a press of sail to avoid a lee-shore should be made good by

<sup>w</sup> Vide sup. c. i. a general contribution<sup>v</sup>. If however the case  
§ 1. art. 1. [v.]

were of that extraordinary nature to justify any claim, it would be for a partial loss;—because an act of necessity, as before argued on the sub-

<sup>x</sup> Vide sup. c. i. ject of running a ship ashore<sup>z</sup>, cannot be con-  
§ 1. art. 2. [a.]

sidered a *voluntary* sacrifice for the general safety. Agreeably to this it has been held, that the damage a ship receives in her rigging from carrying an extra press of sail to *escape capture*

<sup>r</sup> 2 New Rep. 378. by a privateer, is a partial loss on the ship<sup>y</sup>.

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Having thus stated what *is* particular average—it may perhaps be useful to state what is *not*. It is not customary to consider the repairs of the ship, in consequence of springing a leak at sea, as a claim for which the underwriters are liable;—for in all cases of particular average the *onus* is thrown on the assured—(the owner of the ship).—It is not for the insurer to account for the cause of the accident. The assured must show that the damage for which he has a claim is the *direct* effect of a fortuitous accident. *In the absence of such proof*, the springing a leak

is to be attributed either to the working and straining of the vessel—which is the wear and tear of the voyage;—or to some insufficiency or inherent defect;—for neither of which are the underwriters liable. But where the evidence derived from the log-book, and confirmed by the mariners, is sufficiently clear to show that the leak was occasioned by a stroke of the sea, for instance,—when a ship has been suddenly thrown on her beam-ends, and immediately on her righting it is discovered that she has sprung a leak,—there is no doubt that this comes under the head of a partial loss for which the underwriters are liable.

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One of the difficulties in distinguishing between the wear and tear of the voyage, and those losses which entitle the owner to make a claim on the underwriter, arises from the unsatisfactory nature of the evidence obtainable on these occasions; which evidence generally consists of merely a *protest* and a *survey*: the former drawn up by a person, from the nature of his profession unacquainted with navigation and practical seamanship, and therefore liable to make erroneous details; and the latter apply-

ing only to particular cases of actual perceivable damage done to the ship's hull or her masts. From this it may be gathered, that the correctness of such claims must in a great measure depend on the skill and judgment of the person who undertakes the adjustment; and that no rules can be given which would hold good in all cases, or be generally useful. The log-book is always of much more use in matters of this kind than any protest;—in confirmation of this, Magens remarks that (even in his time) protests were become almost a mere matter

\* 1 Magens, 87, of form <sup>2</sup>.

As the underwriters are not liable for the wear and tear of the voyage, neither are they liable for damage or loss occasioned by rats or worms eating holes in the ship's side or bot-

<sup>2</sup> 1 Esp. Rep. 444. tom <sup>2</sup>.

<sup>4</sup> Camp. Rep. 203.

In the adjustment of a claim for a partial loss, and also for a general average, (where any of the ship's materials are sacrificed,) it is customary to deduct *one-third* from the new materials and labour (1)—and unless a ship be perfectly new,

(1) The custom of France, and particularly of Bordeaux, in regard to West India Shipping, is as follows:—to allow 40 months service for wood-sheathing, and 60 months for copper-sheathing. For the *first* voyage to

*i. e.* on her first voyage, or the materials sacrificed be perfectly new, this deduction is invariably made. The owner will sometimes complain of the hardship of the case where a cable has been only once or twice wetted—and sails have been only once or twice bent previous to the time of the accident;—but he should recollect that though one-third is deducted in cases where materials are worn only perhaps *one-twentieth*, yet there is no more than one-third

consider the cordage, sails, &c. as worn one-third—the *second* voyage two-thirds—and for the *third* voyage, three-fourths.

One of our Insurance Associations, which is conducted by very experienced and intelligent ship-owners, has the following rules in regard to copper-sheathing:—During the *first* year, no deduction is made,—during the *second* year one-fifth is deducted, and so on deducting one-fifth more for every succeeding year till the completion of the five years—after which period the Association does not make good any part of the copper. Thus allowing, as at Bordeaux, 60 months' service.

The custom of Lisbon appears to be more reasonable than ours,—there one-third is not deducted from merely repairs, but only from *amelioration*.

At St. Petersburg, painting the new work comes under the denomination of ornament, and is not charged in the average; but with us the painting is allowed, when the damage happens on the outward voyage, and the ship had been newly painted before she sailed.

deducted where they are worn *nineteen-twentieths*. Thus the rule by acting invariably is found to be equitable in its operation. (1)

- 1 Mag. 159. (1) With respect to a partial loss on the ship when she puts into an intermediate port to repair her damages, and is afterwards lost,—Magens says<sup>b</sup>, that where the insurance is charged in the claim, the (original) insurer is to pay the value of the ship, less the particular average, (which he paid before,) but where no insurance is charged, the insurer is to pay the full value of the ship, in addition to what he paid before for particular average.



## PART II.

**Of Valuations.**


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THE general principle of indemnity holds good in all cases of insurance, whatever may be the thing insured. The *data*, on which the interest in goods is founded, are the first cost, or value on board the ship at the place of loading, with the premium of insurance, the policy duty, and (when incurred) the commission for effecting the insurance; to which may be added, *if inserted in the policy*, the charges of recovery in case of loss. This is the value as between the assured and the insurer, "*in the absence of any express contract on the subject* \*." No deviation can be made from this rule without the consent of the insurer. <sup>12 East's Rep. 639.</sup>

*Article 1. On Policies on Goods.*

The subject of valuations in policies on goods has occasioned much difference of opinion in

Lloyd's; it is rendered complex in consequence of the generally received idea,—that a different rule ought to govern in the case of a partial loss, from that which governs in a total loss. Strictly speaking, the *value* of the thing insured, as relates to a *policy of insurance* construed as a contract of indemnity, is, as before mentioned, the cost on board and the premium, and commission on the same (1). But as this is not always the value to the merchant, it has been found consistent with the liberal practice which ought to prevail in all commercial dealings and contracts, to allow the assured to value his goods in the policy, and to include in such valuation a fair mercantile profit. This is consistent with equity, and also with law<sup>b</sup>; and in case of a *total loss* the principle is not disputed, but the valuation is held good. And the same in the case of (what is called) a *salvage loss*, which partakes so much in its nature of a total loss.

<sup>b</sup> 12 East's Rep. 639.

• Ord. Hamb. tit. xii. art. 4.

(1) Agreeably to this, the ordinance of Hamburg<sup>c</sup> enacts—"Where no valuation is made in a policy, the invoice, with the addition of all charges, and premium of insurance, and re-insurance," (*i. e. insurance of the premium,*) "shall be the foundation whereby to compute the loss."

<sup>d</sup> Lang. sur ord. Hamb. 214.

Langenbeck<sup>d</sup> says, that the above had been the custom of Hamburg and most other places, for many years before it appeared in the assurance code of that city.

But, it is said, “in case of a *partial loss* the valuation must be opened out.” By which is meant, it must be analysed to show its component parts, and if any profit be found, the valuation must be rejected, and the invoice cost, with the premium, &c. be taken as the interest at risk. This assertion does not appear to rest on a good foundation. Let us examine it:—The question is, whether in a partial loss, or a particular average on a valued policy, (including a profit,) the goods being ascertained to be deteriorated, for instance, one-fourth—the insurer shall be called upon for a fourth part of the value agreed to by him in the policy; or whether this valuation shall, *in consequence* of the partial loss, be set aside, and a fourth part of the amount of the cost, with the premium, &c. be demanded in its stead?

The bill which, it has been mentioned\*, was intended to have been brought into parliament in 1747, provided for valuations in case of partial loss, and enacted, that if the goods insured were damaged, the assured should recover according to the valuation in the policy.

\* Vide Preface  
& Appendix iii.

Magens says', “to obtain what is aimed at” Magens, 35. by a valuation, it is not sufficient to make it in the lump, or at so much *per bale* or *chest*, because this would only serve in case of a total

loss. But to make a valuation of service where goods are damaged, or partly lost, the policy must express what particular goods they are, and their value at a certain price by the *piece, yard, pound, &c.* the insured paying the premium in full on that amount."

Millar, to whom we are indebted for much sound sense and just reasoning on this and many other subjects, says<sup>1</sup>, "in certain cases of partial loss upon a valued policy, it has been said that the valuation must be opened. This applies to goods valued generally at a certain sum;—but if valued at *per bale, hogshead, package, ton, &c.*:—the valuation may still hold as a proof of interest, and it need not be opened."

<sup>1</sup> Park, 103.

It is said by Mr. Park<sup>2</sup>—"where the loss is partial, the value in the policy *can be no guide to ascertain the damage*, which then necessarily becomes a subject of proof as much as in the case of an open policy." And hence it has been inferred, that in *all cases* of partial loss the valuation must be opened. "The value in the policy," it is true, "can be no guide to ascertain the damage,"—nor will the *invoice* be a better guide:—"because no measure can be taken from the *prime-cost* to ascertain the quantity of such damage<sup>1</sup>. But this has nothing to do with the necessity of opening the valuation

<sup>2</sup> Bur. Rep. 1170.

in case of a partial loss:—for the above words are used by Lord Mansfield, merely for the purpose of elucidating his position;—that a particular average ought not to be adjusted as (what is called) a salvage loss<sup>k</sup>.

<sup>k</sup> Vide sup.  
Bur. Rep.

Mr. Serjeant Marshall is not more precise on this point than Mr. Park; and in neither of these excellent works is any reason given to support this doctrine.

The only case which occurs in the law books<sup>l</sup>, <sup>l</sup> Marshall, 631. ought to have little or no weight. In that case, the insurance was, “on ship and goods; *valued at the sum insured*.” Therefore, it would have been as necessary to have proved the value, none being specified in the policy, if the loss had been *total*, as it was on its being partial. Besides, the determination of the court on this point appeared to be governed by the evidence of the broker, who swore that “when the loss was partial the policy was considered as an open one.” (1)

(1) As to evidence in courts of law of what is or is not the custom of Lloyd's, it should be taken with great circumspection; more particularly, when it is known that persons of the best information, and who stand the highest in regard to experience and character, differ from each other on many leading points, which out of the room are thought to be settled. The writer takes the liberty to suggest, that it would be well if the jury in such cases

On delivering a late judgment of the Court of King's Bench on this subject, the Lord Chief Justice said <sup>m</sup>, "this case (alluding to the mode of adjusting particular averages) is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a *valued one*; or by stipulating that in case of loss, it shall be estimated according to the value of the like goods at the port of delivery". *In the absence of any express contract* on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, including premium of insurance and commission, as the standard value for this purpose." The Court did not express any opinion as to opening a *gross valuation* in case of a partial loss.

<sup>m</sup> 12 East's Rep. 639.

<sup>n</sup> Vide Roccus de Assec. Not. xxxi.—who cites Santerna de Assec. p. 3. n. 40, 41. Stracca de Assec. gloss. 6. n. 1. Scaccia de Cambiis, n. 169.

<sup>o</sup> Hilary Term, 1811.

<sup>p</sup> Videsup. note, P. 1. c. 1. § 2. art. 4.

On a later occasion <sup>o</sup> the same learned judge was of opinion, that in an insurance on goods valued in the policy, there may be a sum included for imaginary profit, and the valuation cannot be opened, that is,—set aside,—in consequence. And his lordship added, "the valu-

were not only to weigh the evidence very deliberately, but consider the reason and justice of the case, before they give a verdict expressly on a *usage* in Lloyd's <sup>p</sup>.

ation can only be opened where it is very exorbitant or where some proof of fraud can be established."

From the foregoing we may safely conclude that the idea so prevalent in Lloyd's, that "in case of partial loss the valuation must be opened, and rejected if it prove to be more than the invoice and premium,"—is erroneous.

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Valued policies on *goods* are conceived to have originated in insurances on the produce of plantations in the colonies; of which, as no invoice could be had, (no purchase having been made,) a valuation was necessarily adopted, such as would indemnify the planter in case of loss. To this valuation the underwriters agreed, and therefore when a loss took place, either *total* or *partial*, there was no dispute as to the amount of interest.

This practice having been found very convenient among merchants and underwriters, as it served to prevent trouble and litigation, led, it may be supposed, to the adoption of the same principle in the insurance of other kinds of merchandise, which by degrees were *specified* in the

policy, and valued at per bale, hogshead, ton, &c. And though it is still asserted in general terms, that "a partial loss opens the valuation," it is well understood that the assured has no other motive for being thus precise, than that the valuation shall *not* be opened in case of partial loss. If it were not indeed for that purpose, he might have contented himself with a gross valuation only; which would have enabled him to recover a total loss by proving the interest to be on board.

The objections against a valued policy appear equally to apply to a total, as to a partial loss. It is said, in Lloyd's, that when any sum is included in the amount insured, without declaring it as profit, and for which there is no interest, the insurance partakes of the nature of a wager. In reply to this;—"it is settled," said Lord Mansfield<sup>1</sup>, in the celebrated cause of *Lewis v. Rucker*, "that upon valued policies the merchant need only prove some interest to take them out of the act"; because the adverse party has admitted the value, and if more proof were required, the agreed valuation would signify nothing." It is also objected to a valued policy, (which includes a profit,) that there are no means of determining between what is a fair mercantile profit, and what may be deemed ex-

<sup>1</sup> 2 Bar. Rep.  
ut sup.

<sup>2</sup> Stat. 19  
Geo. II.



orbitant;—but these objections are not confined to a *partial loss*.

Some objection may reasonably be made to a gross valuation,—for instance, “on goods valued at £1000”—and a satisfactory explanation should be given before such valuation is allowed. In the case also where a parcel of manufactured goods is valued at a round sum, or even if every package were valued separately, and parts of the packages were damaged,—if the goods are of different values and qualities,—there are no means of adjusting the claim correctly but by resorting to the invoice whereon to apportion the loss. The only matter of consequence to be attended to in that case would be,—that the underwriter is not made to pay a loss on a larger sum than that on which he has received a premium.

It is now agreed and acted upon, that where a valuation is made on *colonial produce*, at per hogshead, barrel, bale, cwt., lb., &c.—or on *manufactured goods*, at per piece, ell, yard, &c. such valuation ought not to be questioned, if (as in all cases it is assumed) the underwriter had consented to it. And where an insurance is made on a specified number of hogsheads, bales, &c. of colonial produce, valued at a round sum:—as “on 100 hogsheads of sugar, valued at

£2000,"—or "on 100 bales of cotton, valued at £1000," there can be no doubt but such valuation ought to stand.

The above relates chiefly to cases where the valuation includes a profit; but when the valuation is smaller than the amount of the invoice covered, which if there be much difference, must generally have originated in mistake, no precise rules are laid down, whether it shall be set aside or be allowed to stand. But in both cases of valuation, the motives of the assured for increasing or decreasing the amount should be inquired into, and those liberal rules which govern in all other commercial dealings should be acted upon in cases of this nature.

If goods are fraudulently overvalued in a policy of insurance with intent to defraud the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board\*. Where however good faith is used between the parties, it is well known that the courts of law always allow the most liberal construction to be put on the words made use of by the assured or the broker; and accordingly, where there was a policy of insurance on goods by "ship or ships," to be thereafter declared;—it was held that if the broker by mistake make a written declaration upon

\* 3 Camp. Rep.  
319.

goods by a wrong ship to which the underwriters have put their initials; he may afterwards in compliance with the orders of the assured, declare upon goods by another ship, without the assent of the underwriters and without a fresh stamp<sup>1</sup>.

<sup>1</sup> 3 Camp. Rep.  
158.

It is scarcely necessary to say, that the consignee or the merchant may at all times *declare* on the policy the interest insured without asking leave of the underwriters, and even without previously having liberty on the policy to do so; the underwriters may however always investigate whether the goods so declared were those originally intended to be insured. The fairest mode is,—to declare the interest as soon as the merchant is himself acquainted with it, and get the underwriters' initials to the same: when the risk is terminated no declaration of interest can be made.—For on an open policy “on goods, to be hereafter declared and valued,” it was held by Lord Ellenborough,—that “the declaration of interest to be available must be communicated to the underwriters, or some one on their behalf, before intelligence has been received of the loss. But the declaration is not a condition precedent; and if no one be made, the policy is then open instead of valued, and upon proof of interest the assured will be entitled to recover.”

“ 3 Camp. Rep.  
150.

As it is advisable that every thing should be done in the first instance to prevent future discussion, it is recommended, that in insurances "on goods" generally, from foreign countries, when no invoice has come to hand, and the merchant has no means of making a declaration on the policy,—the coin, or money of account in which it is customary to make out the invoice,

\* 1 *Magens*, 36. be assimilated in value with our money. And if the merchant, acting as agent, means to insure the charges of recovery in case of loss, it should be so stated in the policy.

### *Article 2. On Policies on Ships.*

The value of a ship is said to be, what she is worth at the port where the voyage commences, including all her stores, outfit, and money advanced for seamen's wages<sup>\*</sup>; the whole covered with the premium of insurance<sup>\*</sup>, commission for effecting the same, (if incurred,) and charges of recovery in case of loss, when required.

<sup>\*</sup> *Marshall*, 623.

<sup>\*</sup> *Le Guidon*, c. 2. art. 9.

It sometimes happens, particularly with ships in the East India trade, that they are valued at different sums in different policies; in such a case, it has been held, that the underwriters on one policy have nothing to do with the other;

and in consequence, that the assured is not to be prevented by his valuations, from recovering his full indemnity. The case was this:—a ship was valued in a policy (No. 1.) at £8000, and £6000 was insured and recovered on *it*; she was also insured on another policy (No. 2.) and valued at £6000, *on which* £600 was insured. Lord Ellenborough held that this latter sum was recoverable, although the owner had already received from another quarter the sum at which the ship was valued in that policy (No. 2.). With the other policy (No. 1.) he held that the underwriters on the policy No. 2. had no concern. “The assured,” he said, “may recover on both, if by so doing he receives *no more* than a complete indemnity’.

7 4 Camp. Rep.  
829.

It is of some consequence to bear in mind, that the value of the ship may in case of loss, make a very material difference in the claim, *e. g.*—in a *salvage loss*, suppose the actual value of the ship be £2000, and she be insured at £3000,—the salvage being £1500, the loss is £1500, or 50 *per cent.*; whereas, if she had been insured at £2000, (the actual value,) the loss would have been only £500 or 25 *per cent.* But in case of *average loss*, it would be directly the reverse, *e. g.*—if £3000 be insured on a ship worth only £2000,—the amount of the

average loss is £1500, and the underwriters pay only 50 *per cent.*;—whereas, if only £2000, (the actual value) were insured—the underwriters would pay £75 *per cent.* These remarks are more particularly applicable to an insurance on an open policy,—because in such a case before the loss is settled, inquiry may be very properly made into the actual value of the ship at the time the insurance was effected.

*Article 3. On Policies on Freight.*

On an *open* policy on freight, the interest is, according to the practice of Lloyd's,—the amount of the manifest, or freight list, covered with the premium, &c.

It is said by some, that the interest in freight ought to be that sum, and no more, which the owner calculates on receiving in case of the safe arrival of the ship; because in case the ship is lost, that is all he loses. But the practice is as before stated, and it is probable it will remain so unless the law shall decide otherwise.

In the case of an *open* policy, the assured can only recover the amount of what is actually on board at the time of the loss,—and it is the same even on a *valued* policy, unless a full cargo be provided, or there be a contract either written

or parole to supply one \*. But on a valued policy on a chartered ship, and where the cargo is ready to be shipped,—there is no doubt that the assured is entitled to recover for a total loss \*. \* 3 Camp. Rep. 441.  
\* 1 Maule & Selwyn's Rep. 313.

As in goods, so in regard to the ship and freight—if the charges of recovery in case of loss are meant to be insured, they must, if the policy be an open one, be so declared. (1)

(1) These charges are  $2\frac{1}{2}$  per cent. when the merchant, as agent, effects the insurance through a broker:—*e. g.*  $\frac{1}{2}$  per cent. to the broker for recovering the loss, and 2 per cent. to the merchant for his commission, thus:—

Amount of loss recovered of the underwriters	£500
Deduct brokerage, $\frac{1}{2}$ per cent . . . . .	2 : 10
	<hr/>
	497 : 10
Deduct commission (on amount received from the broker) 2 per cent }	9 : 19
	<hr/>
Neat sum..	<u>£487 : 11</u>

## PART III.

**Of Return of Premium.**

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THE assured is, under various circumstances, entitled to a return of the whole or a part of the premium.

These are:—*First*,—when it is *stipulated* in the policy;—*Secondly*,—when it is *implied* by the nature of the contract.

*Article 1. When a Return of Premium is Stipulated for in the Policy.*

These returns are, for departing with convoy ;—for sailing on or before a certain day ;—for ending the voyage short of its ultimate destination ;—and, in general, for any thing which lessens the risk of the insurer,—who having received a premium commensurate with the extent of the whole risk of the voyage, agrees, (according to the condition,) to make a proportionate return if any specified occurrence take place to decrease that risk.



But in every claim of this nature it is intended, and ought to be so expressed in the policy, that the ship shall have arrived at her ultimate port of destination. Lord Ellenborough said <sup>a</sup>— <sup>a 4 East's Rep. 398.</sup> “the words ‘*and arrive*’ annex a condition which over-rides and governs equally *all* the several stipulations contained in the policy, for a return of premium in the events of a sailing with convoy for the different parts and subdivisions of the voyage.” And in point of fact, it is well understood, that whatever may be the premium or the stipulated returns in the policy,—if the voyage be not completed;—*i. e.* if the ship, or the article insured be lost short of the port of destination, the full premium is earned. If indeed there were any doubt about this, it would be easy to state, after the printed words in the policy “and arrive,”—‘*at her final port of destination,*’—or by inserting the name of the last port.

In the case of a ship receiving sailing instructions, and departing with convoy, the return stipulated must be made even though she lose the convoy the next day. But this must not be intentional on the part of the master. (1)

(1) A master of a ship is liable to £1000 penalty, if (having no licence,) he depart or sail without convoy from

If the insurer pay a loss of *any part* of the interest, he cannot be called on for a return of premium on that amount. And accordingly the practice is, when a partial loss or a particular average occurs, to allow the underwriter to retain the premium on the amount of the claim; it being considered that so much has not arrived. This I conceive to have been the custom for at least thirty or forty years past,—for it is mentioned by Weskett<sup>b</sup>, as the practice

<sup>b</sup> Weskett, art.  
“Av.”

the place of *rendezvous*, or if he wilfully separate from the convoy without leave; and the penalty is increased to £1500 if he have naval or military stores on board. Stat. 38 Geo. III. c. 76. § 3.

But to make the owner liable under this statute, it must be brought home to him, that he was consciously instrumental in the ship's sailing without convoy<sup>c</sup>.

<sup>c</sup> L. Ellenborough, N. P. E.  
T. 1814. MS.

It will be in the recollection of many of the subscribers to Lloyd's, that some years since, (in 1798) the masters of certain American ships took advantage of the clause in the policy,—to return part of the premium for departing with convoy and subsequent arrival,—and immediately on obtaining sailing instructions, purposely left the convoy and proceeded on their voyage;—accordingly, it became necessary to guard against this, and the condition of the return on such policies was made to be, “if the ship depart with convoy and arrive *with the same*.” Thus, very properly, instead of any thing being gained by this proceeding, the American master was, on a future occasion, put in a worse situation than those who honestly remained with the convoy as long as it was in their power.

in his time, and he does not state it as any thing new. (1)

But the lawyers say, that in case part of the premium is agreed to be returned on performance of some stipulation,—this shall be done though the insurer be obliged to pay a partial loss<sup>d</sup>, <sup>d</sup> Marshall B. 669. because the word “arrives” relates only to the<sup>n</sup> ship even in a policy on goods<sup>e</sup>. Lord Mansfield said<sup>f</sup>,—“in the stipulation for the return of premium no regard is had by the parties to the condition of the goods on the arrival of the ship, for if it had been meant that no return should be made unless all the goods arrive safe, they would have said,—if the ship arrive *with all the goods, or safely with all the goods.*” Lord Kenyon afterwards said<sup>g</sup>, alluding to the full stipulated return to be made when a ship was captured and re-captured,—“if it were intended to make an agreement different from what the

<sup>e</sup> Idem, 671. n. & Douglas's Rep. 255.

<sup>f</sup> Doug. Rep. ut sup.

<sup>g</sup> 7 Term Rep. 241.

(1) Where a partial loss is adjusted on the principle called a “salvage loss,” the underwriter should retain the premium on the whole value of the interest damaged; upon the principle before stated, of the underwriter paying a total loss and taking the proceeds. And so where a total loss is recovered, the underwriter must retain the whole premium, and cannot be called upon for a return of any part for sailing with convoy, “because the total loss includes the entire premium added to the invoice price”<sup>h</sup>.

<sup>h</sup> 4 Taunt. Rep. p. 511.

words import, they would have added after 'arrived,' '*safely from the enemy*,' or other words to that effect."

<sup>1</sup> Park, 371.

It is not, however, the law nor the practice, in case of capture and re-capture, for the insurers to retain any part of the premium stipulated to be returned, but the full return is made<sup>1</sup>; (1) and the same is done in case of a general average, or charges incidental thereto, occurring on the voyage; because these are said not to be in the nature of a *loss*, but are *charges* on the interest, or property at risk, and are conducive to its arrival; and the thing insured does in consequence arrive safe.

An innovation lately took place in Lloyd's, of the underwriter agreeing in case of the *arrival* of the ship, to return a certain portion (generally a half) of the premium. This was on insurances on foreign voyages. I have in vain endeavoured to trace the origin, or discover the

(1) It has been suggested by a merchant who ranks amongst the highest in Lloyd's for experience and intelligence,—that in case of re-capture, the underwriter ought to retain a proportion of the specified return of premium;—for instance, if £100 be taken out of £800 for salvage, then only £700 can be said to arrive, and the return for convoy should be only seven-eighths of the premium stipulated in the policy to be returned for sailing with convoy.

use of this custom. It may perhaps have originated in a mistake,—from filling up the policy with a return of premium “if the ship depart with convoy *or* arrive,” instead of “and arrive.” However that may be, it does not appear to have answered any of the legitimate objects of insurance, nor to have been conducive to any fair commercial result, but is a mere delusion, and has, happily for all parties, now fallen into disuse. It is scarcely known in the courts of law,—though one case is reported<sup>k</sup>; from which we learn, that the assured is entitled to a return of premium “for arrival,” under those circumstances which discharge the underwriter from any loss. This alluded to a seizure on arrival, and a subsequent recovery of the property by the assured.

*Article 2. When a Return of Premium is Implied.*

In general, a return of the premium ought to be made, when the interest intended to be insured has never been brought within the terms of the policy; or, in other words, when the insurer has run no risk<sup>l</sup>. For “risk is, properly speaking, the very essence of the contract of insurance<sup>m</sup>.” It is not indeed consistent with

<sup>k</sup> *La Guignon*, c. 2. art. 18. Ord. France, “d’Ass.” art. 37. Ord. Amst. art. 22.  
<sup>l</sup> For: Ord. passim. Valin, 87. Poth. C. d’Ass. c. iii. § 2. n. 176. Emerigon, c. xvi. § 1. art. 2. 1 Magens, 90. Bur. Rep. vol. 3. p. 1240. Cowp. Rep. 668. Doug. Rep. 585.  
<sup>m</sup> Poth. C. d’Ass. c. 1. § 2. 1 Emerigon, 258.

equity that the insurer, merely because he has subscribed the policy, should retain the consideration, without running any part of the risk for which such consideration was paid. A return of this kind is as ancient as the contract

<sup>a</sup> Loccenius l. 2. itself <sup>a</sup>.

c. 5. § 8.

But the Italian writers, &c. hold, that the assured is not allowed to dissolve the contract at his pleasure, and therefore if he does not proceed in his intended voyage the insurer shall still retain the premium;—except in the case where it becomes impossible that the goods should be shipped <sup>o</sup>.

<sup>o</sup> *Le Guidon*, c. 9.

art. 16. Roccus, Not. xi. xv. and the Italian authors cited by him. Loccenius, l. 2. c. 5. n. 16.

*Emerigon*, c. xvi. § 1. Park. 371.

*Matshall*, 655.

p. 2 *Valin*, 73.

*Poth. T. des C.*

*d'Ass.* c. iii. § 2.

n. 181.

*Emerigon*,

c. vii. § 2.

This return, however, is only to be made when the insurer, *strictly* speaking, has run *no* risk,—for if the risk has commenced there shall be no return <sup>p</sup>. If the policy, for instance, were a *valued one*, and he could at any time, under any circumstances, have been called upon to pay the whole sum insured, though the sum in the policy be twice the value of the effects insured; *e. g.*—if the thing insured be “*valued* at £2000,” and its real value were only £1000, there shall be no return of premium <sup>r</sup>. But where the insurer could never have been legally liable,—as in case of unsea-worthiness, the whole premium must be returned. For “if the risk is not run, though it is by *neglect* or even the

<sup>q</sup> *Magens*,

137.

*Marsh.* 643.

*fault* of the party insuring, yet the insurer shall not retain the premium<sup>1</sup>."

<sup>1</sup> L. Mansfield.

If the insurer knew of the ship's arrival when he underwrote the policy, he must return

<sup>3</sup> Burrow's  
Rep. 1240.

the premium<sup>2</sup>.—But if the assured knew of the loss at the time he effected the insurance<sup>3</sup>, or if neither party knew of the arrival or the loss<sup>4</sup>, the premium shall be retained by the insurer.

<sup>1</sup> Magens,  
p. 90.  
<sup>3</sup> Burrow's  
Rep. 1909.  
Park, 367.  
Marshall, 648.  
<sup>4</sup> Park, 218.  
Marshall, 652.  
Park, 367.

When the risk has commenced, the assured has no longer any power to recede, and the insurer is entitled to the whole premium<sup>5</sup>, if there be no stipulation for a return.

<sup>5</sup> Millar, 535.  
Dong. Rep. 585;  
and vide foreign  
writers ut sup.

Insurances being made "*at* and from," it very seldom happens that no risk has been run:—thus, in case of deviation from the voyage insured,—the property having been at risk the premium is earned<sup>6</sup>—and the *whole* premium<sup>7</sup> is retained, because the insurer has run the risk of a *total loss*. (1) And the same in a breach of warranty, when the risk "*at*" has commenced. Also in an insurance out and home,

<sup>7</sup> Park, 317.

(1) The court of King's Bench determined this, in a case where a ship was chartered for the voyage and was guilty of a deviation, and this, though the insurance was on freight and no goods were on board. It was held, (as in former cases,) that the charter party created an interest on which the policy had attached, and there being therefore an inception of the risk, there could be no return of premium<sup>8</sup>.

<sup>8</sup> 3 Camp. Rep.  
297.

“on ship” or “on goods” though the ship be not able to return, or there be no interest home,—the insurer having run the risk on the voyage out, and been once subject to a total loss, no return can be demanded;—except on East India voyages, where the custom is to return half the premium.

On *illegal* insurances no return can be demanded after the risk has terminated; because the courts of law will not interfere to assist either party, both being *in pari delicto*’.

• Doug. Rep.  
471.  
Millar, 533.  
Park, 373.  
Marshall, 637.

As the whole premium is considered as earned when the risk has commenced, so, if the premium be entire,—as in the case above, of an insurance “on ship” or “on goods” out and home, or in an insurance for time,—or when the ship is bound to several ports,—or the like;—the premium being entire, the risk and voyage are considered also as *entire*. In such cases the premium cannot be severed and proportioned on each,—but the risk being once began the whole premium must be paid\*. Except, it is said, where an express *usage* is found of an apportionment of the premium\*.

• Cowp. Rep.  
668.  
Doug. Rep. 585.  
Idem, 781.  
Park, 386.  
Marshall, 663.  
• Park, 392.  
Marshall, 661.

The retaining the *whole* premium in any or in all of the above cases is no hardship on the assured, because he can always, if he please, provide against it, by stipulating for a return



of premium according as the insurer's risk is diminished.

The foregoing relates to those cases where the whole premium shall be retained, or the whole premium returned,—there being no stipulation in the policy to the contrary. But where the insurer could never have been called upon for a loss of the *whole of the sum* on which he received a premium, the same equitable principle governs as in the cases where the risk has never been brought within the terms of the policy<sup>b</sup>;—and thus, if in any event he could not have been called upon for a loss of more (*ex. gr.*) than a *half* or *one-fourth* of the sum on which he received a premium, he ought not to retain the premium on a larger proportion than that *half*, or *one-fourth* of the interest. The return of premium thus made is called “a return for *short interest*” or “for *over-insurance*.”

Both these terms are used indiscriminately, but the distinction is obvious,—the former is demanded on valued policies, or where the interest is declared;—the latter on open policies, or where the declaration is general.

A return for *short interest* is made in cases where only part of the property declared on the policy is on board; for instance,—if 100 balet of

<sup>b</sup> Loccenus,  
l. 2. c. 5. n. 16.  
Valin, 69.  
Poth. C. d'Ass.  
c. iii. n. 165,  
180.  
Emerigon,  
c. xvi. § 4.

cotton be insured, "valued at £1000," or "at £10 per bale;—or if "100 bales of cotton" be declared, without any valuation;—in such, or the like cases, if there be only 50 bales on board—or only a half the interest—a return of half the premium must be made for *short interest*.

When a return of premium for *over-insurance* is claimed, it is in the case of an open policy on goods or on freight; if in such an insurance the amount underwritten be £1000, and the amount of the property at risk be only £500,—it is evident that there is an over-insurance of £500, and that in case of loss the underwriter could have been called upon for no more than one-half the amount insured,—a return of half the amount of the premium must therefore be made for *over-insurance*.

This latter is in its operation a double insurance, though not intended to be such at the time. For a double insurance, according to Lord Mansfield\*, is where the full value of the interest is insured (or rather where the insurance is effected) on different policies by the same party. In such a case the assured may, when a loss occurs, make his election to recover of which set of underwriters he pleases; and the underwriters of whom he recovers may make a de-

\* 1 Burrow's  
Rep. 489.  
† Black. Rep.  
403.

mand on the others to contribute their proportion of the loss<sup>d</sup>. But on the general principle, of insurance being a contract of indemnity, he cannot recover of both, nor can he demand more than the amount of the interest which he has at stake<sup>e</sup>. Therefore,—in case of a double insurance, a return of half the premium may be demanded on arrival. This is now the law of England<sup>f</sup>.

<sup>d</sup> 1 Black. Rep. 416.  
<sup>e</sup> Park, 308.  
<sup>f</sup> Marsh. 146.

<sup>g</sup> 1 Burrow's Rep. ut sup.

<sup>h</sup> Park, Marshall, &c. ut sup.

The foreign authorities are in general in favour of the risk attaching according to the priority of dates and subscriptions; and this was formerly the law with us<sup>g</sup>. But as it now stands, it would be useless to go at length into this subject;—good reasons might however be given, why it would in many cases be more equitable than the present mode. (1)

<sup>i</sup> Marshall, 149.

In all those cases where the premium is returnable either in whole or in part, without a stipulation in the policy to that effect, it is customary to allow the insurer a *half per cent.*—therefore, whenever it is said that the whole premium, or a part of the premium should be returned, it is with this exception.

This is a very ancient custom, as appears from the foreign laws and ordinances, and the

(1) Vide infra,—Case 3. Article 3.

<sup>b</sup> *Le Guidon*,  
c. 2. art. 16.  
Ord. Antw.  
France, Amst.  
&c.  
Molloy, l. 2.  
c. 7. § 12.  
Loccenius, l. 2.  
c. 5. n. 16.  
Valin sur Ord.  
Fr. art. 10, 16,  
&c.  
Poth. Cont.  
d'Ass. c. iii.  
§ 2. n. 177.  
Imerigon,  
c. xvi. § 6.  
Millar, 548.  
Park, 371.  
Marshall, 676.

foreign writers on insurance<sup>b</sup>. Different reasons have been given for the rule, but the best appears to be,—that as the insurer can never by his own act discharge himself from the contract, if the assured think proper to discharge him, (which he has always the power to do, before the risk has commenced,) he is bound to make him some compensation for his trouble. The principle is acknowledged in Lloyd's, and is always acted upon where no stipulation is made to the contrary.

<sup>c</sup> Poth. ut sup.

But it is said<sup>c</sup> that the half per cent. is not to be allowed the insurer unless the breaking up of the voyage depended on the act of the assured, *e. g.*—if a ship were burnt by lightning before the risk commenced, the insurers cannot demand the half per cent., because the non-execution of the contract did not proceed from the act of the assured, but from a superior force (*vis divina*) against which the assured could not provide; according to the maxim "*nemo præstat casus fortuitos*,"—the insurer cannot in this case demand the half per cent. as a recompense. It is contrary to all principle that a party should be held liable for the non-execution of a contract, when it was not by his fault but a superior force that the contract was not executed.

*Article 3.*

Before this subject is closed it may be useful to mention two or three cases out of the many that have occurred, where the practice is not satisfactorily settled in regard to the apportionment of the interest for the return of premium or loss, after the risk has terminated.

*Case 1.*

A merchant receives advice of an intended shipment of colonial produce, and insures £5000, "*on Goods*." Shortly afterwards he receives advice of indigo being shipped, and insures £5000, "*on Indigo*." The ship arrives, and the whole interest on board is £5000, indigo. The question is,—how to apportion the interest so as to regulate the return of premium?

The underwriters on the policy "*on Indigo*" refuse to make any return, because they say,—"our policy has full interest."

The underwriters on the policy "*on Goods*" refuse to return the whole premium, saying,—"*Indigo is goods, and consequently, we ran a risk of loss in the proportion that the value of the indigo bore to the whole amount insured. In case of loss therefore you might have called on us for our proportion. The contract is be-*

tween you and us, as underwriters on your policy—and not between us and the underwriters on the policy on indigo, with whom we have no concern;—and if we are to have no part of the indigo, because you effected an insurance on indigo by name, it might also have been said, that we were to have no part of the indigo, if you had not insured it at all, but had chosen to run your own risk on it;—for this, no more than the insurance ‘on Indigo,’ is any concern of ours.—And further,—if the interest had been £10,000 in indigo, and a loss had happened, we must, as well as the underwriters ‘on Indigo,’ have paid a total loss; or if, as the interest is at present, it had been lost, the underwriters ‘on Indigo’ might have called on us to bear a proportion of such loss, on the principle of our having underwritten ‘Goods’—which as necessarily include indigo, as the *genus* includes the species.”

It is said by some, that this, like all cases of a similar nature, should be put on the footing of a double insurance, in which case the assured would, as before stated <sup>k</sup>, if a loss were to occur, have the power to make his election, and recover of which set of underwriters he pleased <sup>l</sup>.—The apparent injustice of this mode will be stated hereafter <sup>m</sup>; in the meanwhile it may be allowable to point out the mode whereby in a

<sup>k</sup> 1 Bar. Rep. 489.

<sup>l</sup> 1 Black Rep. 416.

<sup>m</sup> Ut infra. Case 3.

future case of this kind a difference between the parties may be prevented. This is, by declaring the interest on the policies, while the risk is pending, and the assured has the power to do so,—as follows:—On the *first policy* “on Goods, exclusive of a policy for £5000 on Indigo.” On the *second policy* “on Indigo, and in case of loss, a policy for £5000 on goods not to bear any part thereof.”

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*Case 2.*

(A).

Here the insurance is the same (*i. e.* £5000 on Goods and £5000 on Indigo,) but the interest is as follows:—

£2000 Cotton, Coffee, Sugar.

3000 Indigo.

---

£5000 Interest.

---

The whole is lost, and the assured calls on the insurers on the *first policy*, viz. £5000 “on Goods” to pay £2000, and return the premium on £3000 over-insured; and on the insurers on the *second policy*, viz. £5000 “on Indigo,” to pay £3000, and return the premium on £2000.

The underwriters on the second policy object to this, on the principle before-mentioned (in

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Case 1.) viz.—That indigo is goods, and therefore that the policy “on Goods” must take its part of the Indigo;—and they say “the apportionment should be stated as follows:”—

Insured, viz:—

On Policy, No. 1. “On Goods”.....	£5000.
On Policy, No. 2. “On Indigo”.....	5000.
	<hr/>
	£10,000.
	<hr/>

Interest, viz:—

In Cotton, Coffee, Sugar .....	£2000.
In Indigo .....	9000.
	<hr/>
	£5000.
	<hr/>

Thus, the Interest in Goods is £5000, and the Insurance on Goods £10,000.

The policies therefore ought to pay as follows:—

Policy, No. 1.

5 tenths of the loss “on Goods” viz. ....	£2500.
Short Interest ....	2500.
	<hr/>
	£5000.
	<hr/>

Policy, No. 2.

5 tenths of the loss “on Indigo,” viz. ...	£1500.
Short Interest ..	3500.
	<hr/>
	£5000.
	<hr/>

By which it is shown—if this statement be correct, that five-tenths of the Cotton, Coffee,



and Sugar are uninsured, in consequence of the merchant confining his insurance on the second policy to "Indigo," instead of insuring "Goods" generally. Notwithstanding the ingenuity of this statement, there is this inconsistency,—that the merchant, by effecting an additional insurance of £5000, becomes *by that means alone*, short insured £1000;—for if he had not effected any further insurance, he would have recovered his whole loss on the policy for £5000 "on Goods." The apparent inconsistency of the rule arises from the following considerations:—1st. The policy on "Goods" pays its proportion of loss on the goods on board;—that is, its proportion of cotton, coffee, sugar, and indigo, as relative to the whole sum insured *on goods*,—for "Indigo is goods;" but, secondly, the policy "on Indigo," can be called upon for a loss on only its proportion of indigo.

To get over this inconsistency, a second, and to appearance, a more equitable mode has been pointed out as follows:—

(B).

To find the proportion of indigo in the two policies, say,—of £5000, (the *goods* on board,) £2000 is Cotton, Coffee, and Sugar, and £3000 is Indigo.

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As the sum insured on the policy "on Goods," is the same as the amount of the *goods* on board, the proportion of the indigo attaching to that policy is therefore £3000,—to which add, insured "on Indigo" £5000—which will make the amount insured on Indigo, by name, and under the denomination of Goods £8000:—~~then,~~—

If £8000 have interest £3000

£3000, (the proportion attaching to the <i>first</i> policy,) will have . . . .	£1125
£5000, (insured on the <i>second</i> policy,) will have . . . . .	1875
<hr/>	<hr/>
£8000.	£3000.
<hr/>	<hr/>

The claim on the two policies is therefore as follows:—

Policy, No. 1. Loss of Cotton, Coffee, and Sugar	£2000
Of Indigo . . . . .	1125
	<hr/>
	3125
Short Interest . . . . .	1875
	<hr/>
	£5000.
	<hr/>
Policy, No. 2. Loss on Indigo . . . . .	£1875
Short Interest . . . . .	3125
	<hr/>
	£5000.
	<hr/>

Of these two statements, (*i. e.* A and B) though the first (A) is apparently inconsistent, yet it will bear analysis better than the second

(B) if we put the extreme case, which must always be put if we mean to arrive at the truth.—Let then the interest be as follows:—Coffee £2000. Cotton £2000. Sugar £3000. Indigo £3000, making £10,000, which arrives—the Coffee, Cotton, and Sugar are damaged, the Indigo is sound.

The underwriters on the policy “on Goods” £5000. assume that they have an equitable right to insist on having an equal proportion of each of these articles, according to the total sum insured—i. e. 5-10ths, or one half of each—they therefore take half of the

Cotton	£1000
Coffee	1000
Sugar	1500
Indigo	1500

---

£5000.

---

What then is the result? The policy “on Indigo” can have only 5-10ths, or one half of the Indigo,—and thus the merchant is short insured one half of all the other goods, on the same principle as in the first statement.

### *Case 3.*

This case is meant to show the injustice of

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allowing the assured, on the principle of a double insurance, *to make his election* of which set of underwriters he may choose to recover in case of loss, or attach his interest to in case of

<sup>a</sup> 1 Black. Rep. arrival <sup>a</sup>.

416. & ut supra.  
Case 1.

An insurance is effected in war on goods per ship or ships £10,000 at 25 guineas per cent.—A peace takes place, and sometime after, while the risk is pending, the merchant effects a second insurance on goods, also per ship or ships £10,000 at 5 guineas per cent.—on which policy he declares his interest; the ship having arrived, or being lost, he demands a return of premium of the underwriters on the first policy for no interest.

This case is put for the purpose of *directing the attention of commercial men to the subject*, which appears to call for some inquiry. It may also be made to apply to the foregoing cases (1 and 2);—for an insurance may be effected in war “on Goods” £10,000 at 25 guineas per cent. to get rid of which, on a peace taking place, the merchant effects £5000 “on Cotton” and £5000 “on Indigo” at 5 guineas per cent., and demands a return of the premium on the policy “on Goods,” his interest being in Cotton and Indigo.

## PART IV.

### Of the Memorandum.

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THE words forming what is called "the Memorandum" are as follow:—

"*N.B.* Corn, Fish, Fruit, Flour and Seed, are warranted free from Average, unless general, or the ship be stranded;—Sugar, Tobacco, Hemp, Flax, Hides and Skins, are warranted free from Average, under five pounds *per cent.* and all other goods, also the ship and freight are warranted free of Average, under three pounds *per cent.*, unless general, or the ship be stranded."

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On these words many disputes have arisen, and the meaning of them is not yet so well settled as to prevent litigation. My intention is to explain as far as I am able, the meaning of the words, and I am the more induced to do this,

from its being one of the subjects recommended by the Provisional Committee of Lloyd's, in their report of the 19th July, 1811, mentioned in the preface to the first edition of this Essay, viz :—“ *the revision of the policy.*”

The objects of our inquiry appear to me to come under the following heads:—

1. The *Origin and Intention* of the Memorandum.

2. What is meant to be comprehended under the words “*Corn, Fish, Salt, Fruit, Flour, and Seed,*”—which “are warranted free from Average, unless general, or the ship be stranded.”

3. What is meant by the words “free from Average under *five* pounds per cent.” and “under *three* pounds per cent.”

4. The meaning of the words “*warranted free from Average,*”—“*unless general, or the ship be stranded.*”

5. Of the term “*Stranded;*” and what shall be considered as constituting a stranding within the meaning of the policy.

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*Article 1. Of the ORIGIN and INTENTION  
of the Memorandum.*

The memorandum itself first appeared at the foot of our policies in the year 1749<sup>a</sup>. But <sup>a 1 Mogens, 10.</sup> almost all the foreign countries that had a code of insurance laws, had long before made a provision of a similar nature in favour of the insurer. The first instance which I can find on record, is in the policies of the city of Florence in 1530. But it is to be remarked, that none of the foreign policies contained the condition relative to the ship being stranded. How these words, which have been and still are the cause of so much contention, came to form part of the memorandum I have not been able to learn. The London Assurance Company were the first to discover their insufficiency to protect the insurer; for the clause had been inserted in their policies only five years, before they caused it to be struck out<sup>b</sup>; and the Royal Exchange Assurance Company shortly afterwards followed <sup>b 7 Term Rep. 210.</sup> their example<sup>c</sup>.

<sup>c Ut infra,  
art. 4.</sup>

The intention of the memorandum appears to have been to prevent persons from being insured on certain articles, particularly liable to waste, decay, leakage or damage on a sea voy-

\* Ord. Rott.  
 art. 41.  
 Amst. art. 10.  
 & 34.  
 France, art. 31.  
 & 47.  
 Konig. c. vi.  
 art. 3.  
 Hamb. tit. iv.  
 art. 8.  
 Stock. art. v.  
 § 3. & Policy.  
 Copen. art. 1.  
 § 2. & Policy.  
 2 Magena, 298,  
 335.

age, or which were of great value and small bulk, under the general expression of "goods<sup>d</sup>;" whereby the insurer would run a greater risk than he had calculated on. In the "memorandum" in the policies made use of in Lloyd's it has been seen, are not enumerated goods subject to leakage;—for such articles are, according to the custom of Lloyd's, free of average, unless it can be shown that the ship had struck the ground with such force as to make it probable that she had thereby deranged her stowage. It is the same with regard to earthenware, and things liable to breakage,—an average on which cannot be claimed except under similar circumstances.

\* Marsh. 222.

The warranty respecting certain articles being made free of average under a certain *per centage*, is of a later date than the general clause of, free of all average. The former clause it is said<sup>e</sup> was intended to prevent trifling claims being made on the insurers; and Pothier remarks, on the article in the Ord. of Louis XIV., which forbids average losses to be demanded of the insurers unless they exceed 1 *per cent*.—that "if the losses are very inconsiderable, the assurers are not bound to indemnify the assured<sup>f</sup>."

<sup>f</sup> Poth. Tr.  
 Cont. d'Ass.  
 n. 162.



*Article 2. Of the words, CORN, FISH, SALT,  
FRUIT, FLOUR, and SEED.*

It has been determined that the generic expression "Corn," comprehends peas and beans and also malt<sup>s</sup>,—together with every species of grain except *rice*. On a trial where the question was, whether rice was not corn within the meaning of the memorandum, the usage was proved against its being so considered; and the court held, that the common sense of the words ought to decide, unless a clear usage to the contrary were shown; and that here the usage accorded with the plain sense of the words, to show that rice was not intended to be exempted from partial loss<sup>h</sup>. It has been also held that the word *salt*, in the memorandum, does not include saltpetre<sup>i</sup>. This was the opinion of Mr. Justice Wilson, at *nisi prius*, (in 1788,) and having never been over-ruled the law so stands.

The London Assurance Company guard themselves against any other decision, by inserting "rice and saltpetre" among the articles free of all average.

*Article 3. Of the words FREE FROM AVERAGE UNDER FIVE pounds per cent. and UNDER THREE pounds per cent. (1)*

The "memorandum" had been introduced only a very few years before Magens published his valuable work on insurance; he mentions that it was then unsettled what was the true meaning of the above expressions; *i. e.* whether the word average meant any species of loss:— or whether it was only intended to guard the insurer against loss arising from sea-damage<sup>k</sup>.

<sup>k</sup> 1 Magens, 73.  
Weakett, 383.  
<sup>2</sup> Bur. Rep.  
1170.  
Marshall, 239.

The sources from which we derive the clause make the word average, *i. e.* "single" or "simple average," (which the foreign writers oppose to general average,) include all losses proceeding from any other cause than that which produces general average.

It appears indeed to be distinctly understood, that the warranty of "free of average under £3 per cent." on merchandise generally, and on ship and freight, (2) was inserted to pre-

(1) The ordinance of Copenhagen (art. 1. § 11.) and of Hamburgh, (tit. xxi. art. 7.) include *general average* under this warranty.

(2) The word *freight* does not occur in the warranty at foot of the policies of the Royal Exchange and the London Assurance Companies. It is to be presumed, therefore, that all claims for loss on freight are paid, however small they may be.

vent trifling claims from being made on the insurers. But there is a difference of opinion on the subject of the clause "free of average under £5 per cent." when applied to such articles as are liable to be washed out; or of which there may be strictly speaking a partial loss, by the total loss of a part. It is the present practice of Lloyd's to allow a claim on the insurers for sugar washed out, though it should not amount to £5 per cent. This is said to be on the ground of analogy; for the law admits a claim on a policy "free of average" for such part of the goods as are totally lost<sup>1</sup>; from which it has<sup>15 East's Rep. 559.</sup> been inferred that the word "average" was not meant to apply to a total loss of a part. But this inference is not correct,—for since the case above alluded to, it has been determined<sup>m</sup>, = 16 East's Rep. 214, in an action on a policy "free of average," where all the packages of goods (of which sugar was a part,) came to hand,—that there was no claim on the underwriters; though a great part of the sugar was washed out of the hogsheads. (1)

By a total loss of a part therefore, when applied to the term "average," it is meant,—a

(1) These two cases, which are of great importance to the subscribers to Lloyd's, will be considered more at length in the following article.

loss of entire packages, or what may be properly called a total loss of part of the cargo,—and not of a part of each package caused by the operation of *sea-damage*, which is, by the warranty (as far as it goes,) intended to be excluded from the risk.

From all that has been written and said on the subject of this part of the memorandum, it may be concluded that the clauses of £3 and of £5 per cent. were both inserted for the same purpose, and that the warranty of £5 per cent. was declared on certain articles there enumerated, because they were more liable to *sea-damage* than the cargo in general.

The policies of Stockholm, Copenhagen, and the United States, guard against any dispute, by inserting the words “loss or damage” instead of “average.”

Of those articles enumerated under the head of “free of average under 5 per cent.” if several be insured together, and the average be claimed on the whole, the claim should be analysed to find if each be damaged 5 per cent. *e. g.*—if a claim be made of £100, on Flax and Hemp, valued at £1000—*i. e.* 10 per cent.—unless each of them separately amount to 5 per cent. the claim can be substantiated on only one of them.

Various clauses are inserted in policies to guard the assured against the effect of the words which are the subject of this article.—The following are generally made use of, viz.—where several species of colonial produce are insured, it is usual to insert,—“*to pay average on each species, as if separate interests, separately insured;*”—on manufactured goods in bales, trunks, cases, &c.—“*to pay average on each package, (1) as if,*” &c.;—on sugar, “*to pay average on each ten, fifteen, twenty hogsheads,*” (as the agreement may be,) “*succeeding numbers, as if,*” &c. and in the like manner on other articles.

It is now indeed considered so much agreeable to usage, where goods are insured direct from the place of growth or manufacture, that if the clauses, “*to pay average on each species*” of produce, or “*on each package*” of manufactured goods are not inserted, yet a liberal con-

(1) Magens says,—almost all the ordinances seem deficient in not fully explaining when, and after what manner the damage shall be deemed to exceed *three per cent.*; and he expresses a doubt, if 101 chests of goods be insured and three chests be totally damaged, so as to be worth nothing, whether the loss can be claimed of the underwriters.—Strictly speaking it cannot, and it is to obviate this difficulty that the above clauses are by his recommendation introduced into the policy<sup>n</sup>.

<sup>n</sup> Magens, 73,  
74.

struction is put on the omission, and the policy is acted on as if they were. The reason is this, —that no objection would have been made to it when the insurance was effected, and in consequence it is considered in practice, as a mere verbal omission of the broker, and treated as such :—agreeably to the opinion of Magens°, who says,—“in an insurance made generally on goods, each different parcel or kind of goods ought to be considered by itself.”

• Mag. 74.

These words “to pay average on each species,” &c. or “on each package,” &c. mean, that it is not necessary the loss should amount to £5 per cent or £3 per cent. (as it may be, according to the nature of the interest insured,) on the whole amount, to enable the assured to claim a loss of the insurer ;—therefore if, for example,—£1000 be insured “on ten cases of manufactured goods, valued at £100 each, to pay average on each package as if separate interests, separately insured”—and five of the cases be damaged, each £3 per cent.—the sum of £15 may be claimed ; but it does not mean, that if the whole amount of loss be £30—or £3 per cent.—the claim should be analysed (or opened out) to show that each case was damaged £3 per cent. Because, though it is admitted that a written clause in

general over-rules the printed ones<sup>p</sup>, (1) yet here <sup>p 15 East's Rep. 163.</sup> the mutual understanding at the time of effecting the insurance is, that this written clause is to operate in favour of the assured, for whose benefit it is expressly made; and therefore it cannot in good faith be construed against him. (2) But if it should be thought that there were any doubt on the subject, the assured might add—after the words “as if separately insured,”—“if the claim on the whole should not amount to £3 per cent.” Or, he might insure each species,—each package,—or each ten hogsheads, &c.—separately, which after all it is imagined he must do to make the underwriter *legally* accountable,

(1) Lord Ellenborough says;—“Where there is any difficulty or doubt, the *written words* are entitled to have a greater effect attributed to them than the printed ones, in as much as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general *formula* adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.”

(2) Since this was published, the author is proud to say that Lord Ellenborough decided a case in the Court of King's Bench in exact conformity to the above reasoning<sup>q</sup>, viz:—that the stipulation “to pay average on each package as if separately insured” does not preclude the assured from recovering an average loss upon the whole under the usual clause, if it shall amount to or exceed 3 per cent. <sup>157. 1 Stark. Rep.</sup>

and to bring the policy within the statute which regulates the stamp duty.

When *tobacco* is insured from its place of growth, it is usual to insert the following clause,—"in case of average, £5 per cent. on the amount of the interest to be deducted from the average." (1) This clause is particularly necessary in policies on Virginia tobacco, which is liable to become heated in the cask. But it is proper on all tobacco, the growth of the United States; because, from being rolled down to the place of shipping, which is often at a great distance from the place of growth, the cask becomes wet, and the outside of the tobacco is thereby damaged.

Two questions have arisen on the subject of the *ship* being warranted free of average under £3 per cent.; they are as follow:—*first*,—if a ship during the course of her voyage incur damage (of that nature for which the insurer is liable,) not amounting to £3 per cent., and she

(1) I have been informed by a gentleman of great experience, who was one of the subscribers to old Lloyd's, in Lombard Street,—that the intention of the memorandum when first inserted was, that the £5 per cent. or £3 per cent. (according to the thing insured) on the amount of the interest, should in all cases be deducted from the average, the underwriter paying the balance; and that this was then the practice.



put into an intermediate port and repair such damage; and before her arrival she a second time incur damage of a similar nature, which, added to the former, makes the amount £3 per cent.—whether the insurer is liable for such loss? This, (as well as the following,) is among the cases which want authority to settle them. The practice is, that the claim for *one* accident must amount to £3 per cent.

The *second* question is this;—if a ship, in ballast, cut her cable to avoid running ashore, or to escape any other imminent danger,—whether a claim shall be made on the insurer though it shall not amount to £3 per cent. on the value of the ship? “The memorandum,” it is said, “warrants the ship free of average under £3 per cent. unless general, or she be stranded,” and it is contended that this cannot come under the denomination of general average, because there is nothing to *contribute* to make good the loss, and that the insurer, in case of general average, is only liable to repay to the assured, that sum which he can show that he has been obliged to pay in part of a general contribution;—but here, there being only one individual interest at risk, no claim for general average can be made out; for the owner of the ship comes direct to the underwriter and calls upon

him, as principal, to satisfy his loss. This argument does not appear to be perfectly sound; for in the case of a general contribution, the sacrifice is made to preserve the ship, the cargo and the lives of the crew; here two of the objects are attained. It is also the leading feature of general average, that restitution shall be made of those things which are, in time of distress, voluntarily and deliberately destroyed to prevent a greater loss. The loss of the cable in this case cannot come under the head of particular average, (or partial loss,) for that must arise from fortuitous accident. It being therefore not of the nature of particular average, but of the nature of general average, it is conceived that the underwriters ought to pay the loss.

It has been asked in Lloyd's—whether what are called, the *particular charges*, which attach to the cargo or freight, (usual in a statement of general average,) must amount to £3 per cent, to make the insurer liable? Nearly the same arguments apply to this as to the preceding case.—These charges cannot come under the denomination of particular average, to which only this warranty applies; they are not of the nature of a *loss*, but are *charges* incurred to preserve and bring forward the property;—the

clause only contemplates a loss, and that such loss shall arise from an accident.

Doubts are expressed by some, whether the claim for particular average must amount to £5 or £3 per cent., *without the charges*, to make the underwriter liable?—for instance:—

100 hogsheads of Sugar are insured and valued at £2000. The partial loss, or particular average amounts to.....		£90
The extra charges,—of auction duty, sale charges, survey, &c. amount to.....		10
		<hr/> £100 <hr/>

Thus, by the charges being added, the claim is made to amount to £5 per cent. The argument made use of here, is the same as that on the question of a sale of sound and damaged goods, viz.:—that the charges are a consequence of the damage. This is the very reason given by others, why they should not be allowed to operate in this case;—the charges are indeed a consequence of the damage, and therefore, it is said, they are not a *part* of it. The damages must amount to a certain proportion or aliquot part of the principal before costs are incurred; and it is argued that it would be contrary to all rule, if the damages themselves do not amount to the sum required, to permit the costs

to be added for that purpose. Others say, that as indemnity is the great principle and end of insurance, there is no reason why the charges which are obliged to be incurred before the damage can be ascertained, should not form part of the average;—if this be admitted, then there is no further question.

The ordinance of Hamburg perhaps alludes to this subject when it decrees,—that “the damage done to the ship or cargo must amount to 3 per cent., after the *dispatcheur's* charge is deducted’.

• Ord. Hamb.  
tit. xxi, art. 10.

*Article 4. Of the meaning of the words “WARRANTED FREE FROM AVERAGE, UNLESS GENERAL, OR THE SHIP BE STRANDED.”*

The meaning of the word “STRANDED” shall be considered in the next article. Our present inquiry will be directed to the general import of the above words.

I. Of the words—“WARRANTED FREE FROM AVERAGE.”

Two cases have been determined within the last five years, which throw much light on this subject, and with which it is of great importance the mercantile world should be well acquainted. It had been the law indeed ever since the year

1764, that under this warranty the insurers were only liable in the case of a total loss; but what, should be considered as amounting to a *total loss* as regarded the underwriters was not then defined. In 1780, in a cause where a cargo of *peas* arrived at the port of discharge in a very damaged state, so as not to be worth more than one-fourth the amount of the freight,—Lord Mansfield held; <sup>At N. P. 131. T. 1780.</sup> that if the *specific thing* come to the market, <sup>Marshall, 226.</sup> the memorandum warrants the insurer to be free from any demand as for a partial loss. (1)

Two points however are now settled,—viz:—That when goods are warranted free of average, the underwriters *are liable* to pay a total loss of a part, or a partial loss of the whole, if part of the thing insured *go in bulk to the bottom of the sea*: and,—That, (with the same warranty,) they are *not liable* to pay a partial loss, though it be in fact a total loss of a part, if that loss be *the consequence of sea-damage*.

The first case is as follows':—the insurance <sup>' 15 East's Rep. 359.</sup> was on flax, "warranted free of particular ave-

(1) *Pothier* holds that if a cargo of corn become *entirely rotten*, the assured cannot abandon; this being only a simple average, which would not excuse the assured from paying the stipulated freight. His reason is, that though the corn be damaged or spoilt *it still exists*. The damage <sup>" Poth. Contr. Marit. n. 59. 2 Emerigon. 184. Marshall, 228, note.</sup> does not operate an *entire loss*, and the owner is not deprived of it".

rage;”—the ship was wrecked;—the assured did not abandon, but laboured to save the cargo, —and he did save a part, (about one-sixth) though it was much damaged. The following is the judgment of the court; which was delivered by Lord Ellenborough, and to which the other judges assented. His lordship's words are:—“ It was decided in the case of Anderson v. The Royal Exchange Assurance Company”, that in order to constitute a total loss where the thing itself subsists in specie, there must be an abandonment in time to the underwriters. In that case the assured might have abandoned while the corn remained under water; but they laboured to get it up and preserve it; and when they afterwards did abandon, upon finding that it did not answer to them, it was too late. It had been before held” that an abandonment must be made promptly, if at all; otherwise, if part of the goods be saved to the assured, it is only an average loss. Here there was no abandonment; and therefore under the terms of this policy, which *warrants* the underwriter *free from particular average*, the plaintiffs cannot recover unless there was an actual total loss. But how can it be said that there was a total loss of the whole, when ~~one~~ one-sixth of the flax insured still exists in specie, though deteriorated.

v 7 'East's Rep.  
38.

v 1 Term Rep.  
615.

in the hands of the assured? As to that part therefore he cannot recover. But as to the rest, which was in fact totally lost, there is nothing either in reason or precedent to prevent us from saying that the plaintiffs may recover; for no case has been cited to shew that where the least particle of the thing insured subsists in specie, though the greater part of it is actually destroyed, the assured shall be precluded from recovering the value of that which is in fact totally lost. Finding therefore no authority against the construction we have already intimated, and the reason of the thing being with it, I consider the plaintiffs are entitled to recover as for a total loss, *the value of that part which was in fact totally lost*; and that they are not entitled to recover for that part which was not totally lost, but still continued to subsist in specie, though deteriorated in value. (1)

(1) It was contended on this trial that the warranty was only meant to save the underwriter harmless, if the goods arrived at the port of discharge in a damaged state, but that in the case of a ship being wrecked in the course of her voyage, the loss was to be considered as *total*, with benefit of salvage (*i. e.* what is called in Lloyd's "*a salvage loss*."). It was also contended, that an abandonment was necessary where the loss, by the ship and cargo being wrecked, is in its nature a total loss. This was however over-ruled. The courts of law, as before remarked\*, recognise only two kinds of loss;—*total* and *average*.

\* Ut sup. P. 1.  
c. 1.

16 East's Rep.  
11.

The second case to be quoted, it may be presumed, settles the point,—that the insurer, with a warranty of “free of particular average,” is not liable to make good a partial loss,—though that loss is in point of fact a total loss of a part of the thing insured,—if it should be *the effect of sea-damage*. In this case the cargo consisted of sugar and tobacco, the ship drove from her anchors and was wrecked; (1) the whole cargo (as regarded the packages,) was saved and brought on shore, though in a damaged state; the tobacco was quite spoiled by sea-water and worth nothing, *and great part of the sugar was washed out of the hogsheads*. The question was, whether a notice of abandonment could make the underwriter liable to a total loss? Lord Ellenborough said;—“All the goods were got on shore and saved, though in a damaged state. When the loss happened and the goods were landed, this was not a total loss, however unprofitable they might afterwards be. If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average may as well be struck

(1) It may be proper to state,—that in this, and in the former case, the goods were warranted free of particular average, *unconditionally*:—*i. e.* there was no mention of the words, “if stranded.”



out of the policy." Mr Justice Bailey said,—  
"The very object of the exception is to free the underwriters from liability for damaged goods. They say, in effect, that they will be liable if the goods are wholly lost, but not if they are only damaged." (1)

(1) Agreeably to the above decision, a special jury of merchants found a verdict for the defendant in a recent cause, of which these are the particulars:—Ten hogsheads of sugar were insured "free of particular average"—the ship was wrecked.—All the packages were saved, with a very small quantity of sugar remaining in each.—The jury considered that a partial loss from the effects of sea-water, —though in point of fact a total loss of a part,—was a *particular average*,—for which, according to the warranty, the underwriters were not liable.—Guildhall, 16 July, 1816. C. P. (*Hedberg v. Pearson*) MS. Since this was published the case has been reported. And as it is of great consequence to the members of Lloyd's it is thought proper to give the proceedings at length:—The late chief justice (Gibbs) recommended the jury to find a verdict for the plaintiff, subject to the opinion of the court, "whether this was a total or a partial loss?" The author, who was the foreman, respectfully asked his lordship,—  
"Whether free of particular average did not mean,—*free of the effects of sea-water*?" He answered "certainly."—  
"Then my lord," he replied, "the jury are unanimously of opinion, that the sugar having been washed out by sea-water, and the underwriters being free from the effects of damage from that cause,—there is no claim on the policy." The judge appeared dissatisfied, but a verdict was recorded for the defendant. At the sittings in the following term, Mr. Serjeant Lens moved to set aside the verdict, and have a new trial, on the ground "that the jury

## II. As to the meaning of the words, "UNLESS GENERAL."

\* 3 Bur. Rep.  
1550. Marshall,  
225.

It has been contended<sup>\*</sup> that the words of the memorandum amount to a *condition* to be free from average unless in the case of a *general average*, or the stranding of the ship: but, if *either* of these events should happen, the warranty was discharged. This was over-ruled, as it might be expected it would be, by Lord Mansfield;—and it is only mentioned here for the purpose of giving an additional proof, if any were needful, of the ambiguity in wording the memorandum, and of the necessity of a revision of it. The words, "*unless general*," obviously mean, as is the practice,—that in all cases the underwriter shall be liable to the payment of general average, whatever may be the amount.

## III. Of the meaning of the words "OR THE SHIP BE STRANDED."

These words must be taken as they bear upon the whole of this clause.

Five years after the memorandum was introduced, a cause was tried at *nisi prius*<sup>a</sup> before

\* Cited 3 Bur. Rep. 1553.

<sup>7</sup> Term Rep.

222. Marshall, had *somewhat intemperately* taken upon themselves to decide the law on this point." The court refused the rule,

223. n.

<sup>b</sup> 15 East's Rep. and held that the jury had rightly decided<sup>b</sup>.

559.

Lord Chief Justice Ryder, and a special jury of merchants,—who considered these words as a *condition*, holding that by the ship's being stranded, the assured was let in to prove his whole partial loss on a cargo of corn. It was in consequence thereof that the insurance companies struck the words relative to stranding out of their policies <sup>c</sup>.

<sup>c</sup> Ut supra, 199.

This opinion of Sir Dudley Ryder was controverted by Lord Mansfield <sup>d</sup>, who held (as did Mr. Justice Buller <sup>e</sup> after him,) that the insurer was liable in case of stranding, only for the damage *arising from* such stranding. This was considered as law till the year 1790,—when Lord Kenyon delivered his opinion to the contrary <sup>f</sup>. In 1796, it was determined, after solemn argument before the Court of King's Bench <sup>g</sup>,—that in the event of the ship being stranded, the assured was let in to claim a partial loss on the articles enumerated as free of average, and these articles were by that event put in the same condition as any other commodity. (1) Lord Kenyon said,—“if it had been

<sup>d</sup> 2 Bur. Rep. 1550.

<sup>e</sup> 4 Term Rep. 783.

<sup>f</sup> Cited 7 Term Rep. 216.

<sup>g</sup> 7 Term Rep. 210. Marshall.

(1) It may be remarked of those goods, (which are warranted free of particular average, unless the ship be stranded,) that if they are by the stranding put in the *same condition* as any other goods which do not come within the warranty—then no claim should be made on.

intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said, 'unless for losses *occasioned by the stranding.*' But in the body of the policy they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is, 'free from average unless general, or *unless* the ship be stranded;' so that if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and grammatical construction of the policy." Mr. Justice Ashurst said,—“As it is difficult when a ship is stranded to determine whether or not the damage to the cargo arose from the stranding, or in what degree it was imputable to that cause, this memorandum seems to have been introduced to avoid that inquiry, and that when the ship has been stranded, the insurers consent to ascribe the loss to that cause. This construction will prevent endless litiga-

the insurer for the effects of any other damage than that which he would be liable to *on any other goods*—which in a case of this nature can only be sea-damage;—and not any damage from the nature of the article.

tion.” (1) This was the opinion of a most sensible and learned judge;—but it is respectfully submitted, that if the intention of the parties were only to prevent litigation—the striking out altogether of the words “or the ship be stranded,” would be more conducive to that end than any construction that may be put on them.

*Article 5. Of the word “STRANDED;” and what shall be considered as a stranding within the meaning of the policy. (2)*

For a ship to be stranded within the meaning of the policy, it has been said that, she must be

(1) This opinion of Judge Ashurst will remind us of that of Molloy, who wrote one hundred and fifty years ago,—and who in his book called *De Jure Maritimo et Navali*,—speaking on the subject of the perils enumerated in the policy,—says, the words are so comprehensive, that all those various questions which occasioned much debate and controversy among the lawyers of former days are now *finally settled!* Though we are not well acquainted with the lawyers who preceded Molloy, nor much with him as a lawyer, yet we may safely affirm that he was no prophet.

(2) On a late occasion in Guildhall, when the author was on the jury, the learned lord who presided in the Court of King’s Bench said,—“It is much to be lamented that some understanding cannot be had on this subject. Either abolish the clause or determine what shall consti-

cast on shore by the violence of the winds and waves, or run aground to avoid a greater dan-

<sup>b</sup> Marshall, 240. ger <sup>b</sup>. Some underwriters in Lloyd's contend that to be stranded, a ship must be actually wrecked and leave her remains on the beach. Those who say this, perhaps argue more from the hardship of the case, than from precisely a wish to give the true meaning of the term;—they imagine that if stranding be not limited to this, every touching of the ground might be considered a stranding, and a claim be in consequence let in to a partial loss on the articles enumerated as free of average, unless this event take place;—and thus the memorandum itself will be rendered nearly nugatory. An inge-

<sup>c</sup> Darcy Lever, 120.

nious writer "on Practical Seamanship"<sup>1</sup> seems to be of the same opinion, he gives the following definition of the word, "when a ship is run ashore so that she cannot be got off, she is said to be stranded." The ordinance of Hamburgh

<sup>b</sup> Ord. Hamb. tit. xiv. art. 5.

defines stranding,—“got fast upon a sand<sup>k</sup>.” According to Dr. Johnson, the word “strand” means “the verge of the sea or of any water;”

tute a stranding within the meaning of the policy. This might easily be defined, and when once so defined it would be of little or no consequence in general, whether it operated for or against either of the parties because its operation would be general.”

—"to strand" is "to drive or force upon the shallows." From which it may be inferred—that to "be stranded" means to *remain* upon the strand, for some specific length of time, not merely "a touch and go," but a resting there.

The great difficulty as it affects a policy of insurance, appears to be to distinguish between a common casualty of the voyage,—a simple stranding or lying on the ground,—and an accident which might be fatal, or at least very injurious, if not timely prevented.

Four cases have come before the Court of King's Bench, in which the meaning of the word has been fully considered—three of these were tried at *nisi prius*, and the fourth had a solemn argument at bar.

The first was before Lord Kenyon, in the year 1799<sup>1</sup>; who held that a vessel was to be considered as stranded, (so as to let the assured in to recover a partial loss on corn,) which had run on some wooden piles, four feet under water, in Wisbeach river, about nine yards from the shore,—but placed there to keep up the banks of the river, and which lay on these piles until they were cut away.

In 1801<sup>2</sup> a cause was tried, also before Lord Kenyon, who determined the point that every *resting* on the ground could not be considered

<sup>1</sup> Marshall, 239.

<sup>2</sup> Marshall, 240.

a stranding. Here the ship arrived in the Thames, but upon coming up to the pool, which was full of vessels, one brig ran foul of her bow and another of her stern, in consequence of which she was driven aground, and continued in that situation for one hour. Lord Kenyon told the jury, that unskilled as he was in nautical affairs, he thought he could safely pronounce that this was no stranding. The jury were of this opinion, and found a verdict for the defendant.

The third cause to be cited was tried in 1813, before the late Lord Chief Justice of the Court of King's Bench<sup>a</sup>. It was an action to recover an average loss on a cargo of barley, and the question was,—“ whether the ship was stranded within the meaning of the memorandum?”

As the ship was proceeding down the river from Limerick, the wind took her ahead and she went ashore stern foremost. There she remained fast for two hours till the tide flowed, when she got off and proceeded on her voyage. A witness stated that she must have strained a good deal while lying on the ground, but when she again floated it was not perceived she had sustained any injury.—Lord Ellenborough said, “ I am of opinion there was here a clear stranding within the meaning of the memorandum.

<sup>a</sup> 3 Camp. Rep. 429.



It is not merely touching the ground that constitutes a stranding. If the ship touches and runs, the circumstance is not to be regarded. There she is not in a quiescent state. But if she is forced ashore, or is driven on a bank, and remains for any time upon the ground, this is a stranding without reference to the degree of damage she thereby sustains. To remove all doubt upon the question, this clause is introduced. The stranding is a condition precedent, and when that is fulfilled, the warranty against particular average ceases to have any operation."

The last case to be cited was tried before Lord Ellenborough at *nisi prius* in the London Sittings after Michaelmas term, 1815. The action was brought to recover an average loss on a cargo of oats on board a ship bound from Barnstaple to London. It appeared on the trial that the ship struck upon a rock near Grimsby, where she remained stationary on her beam-ends for about a minute and a half; and then got off into deep water and resumed her voyage. His lordship was of opinion, that this was not a stranding within the policy, and therefore directed the plaintiff to be non-suited. In Hilary term a motion was made to set aside the non-suit and have a new trial. The first and second cases above quoted were brought forward by the

counsel,—on the *first*, Lord Ellenborough remarked,—“ I should not take the difference, whether the ship was thrown upon the piles, mud, or what is in common parlance called the strand, provided it is a stoppage of the voyage. It must be *fixed* on the place where it stops, whether it be upon the shore or on any other place. There must be a *resting, an interruption of the voyage.*” It was then contended, that in the case before the court there was in point of fact an unequivocal *resting*, no matter for what time—there was an actual stopping, and resting upon the bottom for a minute and a half. The ship was actually arrested in the progress of her voyage for that period. If the voyage was stopped for any time, no matter how short, it was a stranding within the meaning of the memorandum. Lord Ellenborough said,—“ the evidence at the trial was, that the ship, coming out of the harbour of Great Grimsby, struck upon a rock and remained there about a minute and a half. You must then come to this rule,—that every *instantaneous* stoppage of the progress of the voyage is a stranding—that a stoppage for the minutest portion of time is an interruption of the voyage, and consequently a stranding.” The counsel said,—“ I must certainly contend that.” “ Then,” re-

sumed his lordship, "I say that is not the meaning of a policy of this sort. The true meaning of it is,—where there is a settling of the ship upon the bottom from which a number of injuries may arise,—such as the straining of all the timbers, and so forth, where there is a sort of wreck *pro tempore*—then, and then only are the underwriters liable. There was never more waste of understanding in the discussion of any subject, than in endeavouring to find out the meaning of this word 'stranding,' which was rather the construction of a term of science than a question of law; and I should never have made this observation perhaps, did I not feel some degree of conscious shame in the part I myself have taken in the discussion, when actively engaged in the profession. There must be a wreck of the ship *pro tempore* to bring it within the memorandum". (1)

• 4 M. & Sel.  
503.

A great deal has been said in Lloyd's about the necessity of extra-assistance being rendered

(1) It would be difficult for nautical men to know what is meant by this sort of wreck. It has been however suggested to the author, that it is probable his lordship had in view the "*echouement simple*" of the French writers, which is described by Emerigon, ch. 12. § 13.

to the ship;—of part of her cargo being taken out;—and in fact, that if she were got off the ground without any other assistance than that of her own crew, there would be no stranding within the meaning of the policy. I am glad that I have it in my power before closing this subject, to say that all these are mere speculative points. This last decision will, it is to be hoped, if the clause be suffered to remain, put the matter finally to rest. (1)

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As Magens' work on insurance is scarce, and is not generally known to men of business of the present day, and as he was a merchant of

(1) Since the third edition of this Essay two cases of Stranding have been decided. By the *first* it was determined,—where a vessel struck upon a rock and remained fixed for the space of fifteen or twenty minutes, in consequence of which she sustained a material injury,—that this was a stranding for which the underwriters were liable.<sup>p</sup> In the *second* (which is not yet reported) the author was on the jury, when it was held by C. J. Dallas, that to constitute a stranding, “a ship must be driven on shore by the force of the winds and waves, or strike on a hidden rock.” The ship, in the case before the court, was in harbour, where the tide left her, she fell over, and was bilged: this the judge said was not a stranding within the meaning of the policy.

► 1 Stark. Rep.  
486

great knowledge and experience in insurance and shipping affairs;—perhaps I cannot bring this essay more usefully to a close than by quoting what he says in the last pages of his elaborate work.

He strongly recommends to merchants<sup>a</sup> to proceed on his plan;—(that of stating general and particular Average cases,) and he remarks, —“ by the diversity of cases, as well as of the intricacies and difficulties resulting therefrom, which time might present to their view, they would find that a great deal more remains unobserved than has been touched on already; and that the longer we apply ourselves to the practice of making observations, the more we shall be convinced that we knew but little before.

“ If we look back to the suits at law which have been carried on for many years past (1) about these affairs, and could at the same time be let into a true detail of their merits, we should find that most of them have arisen from our not having given ourselves the trouble to explain our own meaning, and the accustomed methods of such dealings.—And we are thoroughly persuaded, that the lawyers of most eminence will allow, that such matters as are

(1) This was in 1755.

contained in the foregoing cases, may be much better decided by experienced merchants and good accountants, than by persons however learned they may be, who have studied the

• Vide *infra* p. v. law only •.”

## PART V.

## Of Arbitration.

ARBITRATION has of late years become of the very first importance to the mercantile world : the immense increase of the business of Lloyd's, would without any other cause be sufficient to account for this ; as, from the law and the practice being unsettled, insurance necessarily produces subjects of difference ; it having been well observed, that " there is scarcely any contract which affords a greater number of questions of doubt and difficulty than that of marine insurance \*."

\* Marsh. pref.  
p. vii.

The object of every one engaged in commerce, is to obtain a settlement of the disputes occurring in the course of his business with as little delay, and at as small an expense, as possible. This, which may be considered as an axiom, could not fail to strike those who had

the formation of codes of insurance law ; and, accordingly we find, in all those compilations most worthy of attention, an article, directing all differences arising between the parties, to be referred to the tribunal, or chamber of commerce, of the city, which appointed arbitrators to settle the dispute; and in all foreign countries having much external commerce, this is the practice of the present day. In England, up to the commencement of the seventeenth century, it was the custom to refer insurance disputes to the arbitration of merchants ; but, nearly at the close of the reign of Elizabeth, an act was passed<sup>b</sup>, by which the Lord Chancellor was enabled to grant a commission to certain persons to try all insurance causes ; and “ to prevent delay,” they were authorised to proceed as well out of term as in : but, as if the high officer from whom the commission was to emanate were jealous of the power given to this court, it was ordained, that if either of the parties were dissatisfied with its judgment, a right of appeal lay to the Chancellor himself. This, one would suppose, would have been of itself sufficient to have defeated the intent of the law, (which was expressly made “ to prevent delay,”) without the intervention of another clause, which, if enforced, would pro-

<sup>b</sup> 43 Eliz. c. 12.



bably, in a very short space of time, be the destruction of all the courts of law and equity in every country in Europe; this was,—the expressly prohibiting the commissioners and officers of the court from charging or receiving any fee for their trouble; and not appointing them any salary for their services. With these two clauses in the act, we cannot be surprised, that “the Court of Policies of Assurance” did not answer the purpose intended; and the fact is, that either from its dilatory proceedings, or from the non-attendance of the commissioners, (both of which might have been anticipated,) it soon fell into disuse. Other reasons are given by the lawyers for this, but commercial men, in the habits of business, will perhaps consider these as sufficient. In the preamble to the act, (made in 1601,) it is stated,—that before the passing of it, the settlement of these disputes was left to the *arbitration of merchants*; which were to be, “certain grave and discreet men, appointed by the Lord Mayor of London.” Thus, before this act, merchants were in England, (as they had been in foreign countries for a long time previous thereto,) considered the only expounders of the law of insurance.

The author is too well acquainted with, and has too great a veneration for the principles of

the law of England to depreciate the value of the decisions of its courts of judicature; yet it cannot be doubted, that notwithstanding these, and all that has been written on the subject, the practice of insurance is still unsettled, new cases constantly occurring in Lloyd's on which differences of opinion arise. These differences in regard to the practice, always taking the law, where it is settled, as the ground-work, are properly the subject of arbitration; and the more so, as there is no alternative in the settlement of *Insurance disputes*, but a suit at law; for the demand being a demand in law, courts of equity will not, or rather cannot, interfere, from having no jurisdiction over it<sup>c</sup>. *Matters of account*, either mercantile or otherwise, are also more peculiarly the subjects of reference, since "Actions of Account" in the courts of law have fallen into disuse, from their not carrying damages with them. *Copartnery*, which by the civilians is called "the mother of discord," is also a fruitful source of arbitration: as are all *Money transactions*, in which the sum claimed or due is uncertain;—uncertainty being the essence of arbitrament. For things which are in their nature certain;—such as a debt due on a bond, damages recoverable by a judgment of a court of law, and the like,—would not be made the

<sup>c</sup> Bro. Parl. ca.  
525. Park, 393.

subject of arbitration ;—because in such cases the demand is already ascertained by law. The advantages of referring to arbitration all cases of complicated calculations must appear evident, for even the learned judges on the bench always suggest or admit, the propriety of adjusting them out of court.

But, in general, the great advantages which arbitrations have over suits at law are these ;—the parties themselves can be heard on oath, and produce their documents without the necessity of proving every item, and every handwriting, which the forms of the courts of judicature require. Many cases occur, where it is essential for the ends of justice, that the strict rules of law should be dispensed with ; for, from want of precaution, or from other causes, it often happens with the best intentioned, that there is no other evidence to be had than the parties themselves ; and, unless men were to adopt the maxim of the sophists,—of “ living with their friends as if they would one day become their enemies,” such cases must often occur. It has indeed been very properly said,—that a judge who can examine the parties themselves ; who can observe their looks and demeanour ; and who, without being confined to the strict rules of evidence, is at liberty to decide from circum-

stances of probability, has manifestly a singular advantage over judges in courts of law, where the forms of action, modes of pleading, and rules of evidence must be strictly adhered to<sup>d</sup>.

<sup>d</sup> Kyd, 3.

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It is intended in the following pages to avoid the technicalities of the law, at least as much as the nature of the subject will admit of; and to this end the cases which have been determined will not be quoted at length, and those which are not essentially necessary to elucidate the general principle, will only be noticed so far as is connected with THE PRACTICE OF MERCANTILE ARBITRATION.

## SECT. I.

### OF THE ARBITRATOR.

An Arbitrator is an arbitrary judge. This is the true etymology, which we trace back to the Roman law; for in the Institutes, which bear the title of "the Elements of Justinian," the *discretionary judge* is what we call an arbitrator; and the actions depending on his arbitration are called "Arbitrary." An arbitrator

<sup>a</sup> El. Just. l. iv.  
c. 6. § 30, 31.

was one of the most ancient and honourable of judges; the office occurs frequently in the history of Rome, arbitrators being appointed to settle differences between hostile kings, who were allies of the Roman people.

The difference between the two terms,—Arbiter and Arbitrator,—is really only verbal, though some say, that the former signifies a person nominated by a judge to arbitrate a point of law, and that the latter is used for a person chosen by contending parties to settle their disputes. Civilians make this distinction; but the term “Arbitrator,” is sufficiently comprehensive, it being used in rules of court and in judges’ orders.

We proceed to treat of the COMPETENCY and the ELIGIBILITY of an arbitrator; before which, however, it may be proper to say something of his power as we find it in the Roman law, and as it is recognised by the law of England. An arbitrator then, is like the Lord Chancellor, a judge in equity; and like him, his judgment is presumed to be governed purely by the law of nature and conscience. From his sentence there lies no appeal; and no legal, or other tribunal, can enquire into the equity of his

decision. This was the law two thousand years ago, and so it is at this day <sup>b</sup>.

<sup>b</sup> Dig. l. xvii. t. 2.

<sup>2</sup> § 76. &c.

<sup>3</sup> Eq. ca. abr. 80.

p. 8.

<sup>1</sup> Vesey jun.

369.

Every man whom the law supposes capable of judging, whatever may be his character for integrity or wisdom, is *competent* to be an arbitrator, because, it is said,—“he is appointed by the parties themselves, and if they choose an improper person they must suffer for their own folly.” The persons whom the law considers incompetent, and whose award would be set aside, are as follow:—1. Those who by nature or accident have no discretion,—such as an insane person, or one who is born deaf and dumb. 2. A person under age. 3. One under the controul of another. 4. An infamous person, *i. e.* one attainted of treason or felony. & 5. One of the parties in difference, for *aliquis non debet esse judex in propria causa*, is a maxim in law. With these exceptions, every one is

<sup>c</sup> Dig. l. iv. t. 8. *competent* to be an arbitrator <sup>c</sup>.

§ 7. Kyd, c. iv.

It is almost unnecessary to observe, that in one who undertakes to practice as a professional arbitrator, there is an essential difference between being *competent* and being *eligible*. The latter is a delicate subject to treat of; but in a work of this nature it will not be thought irrelevant to say something on it; and more

particularly, as it is entirely in consequence of an improper choice of arbitrators that references have been often deprecated as acting directly contrary to their intention, viz :—retarding the settlement of differences, instead of bringing them to a close. In former times, when our commerce was not so extensive, mercantile business was conducted on a comparatively limited scale ; and the character and requisites of a merchant were not precisely what they are at the present day. Now,—many of the merchants of England are her senators ;—many rank with her nobility ;—and some (as the directors of one of our great trading companies,) are in power greater than even “ the princes of the earth.” Heretofore, merchants of London *aspired* to the rank of chief magistrate of the city ;—these were the times when, as has been before mentioned, “ the Lord Mayor of London appointed certain grave and discreet men to be arbitrators of mercantile differences.” It may readily be conceived, that if this custom were to be revived, but few persons on the Exchange or at Lloyd’s would be found to submit their cases to their decision ; for, though to be grave on solemn occasions, is as desirable as to be discreet on all, yet gravity and discretion are far from being the only requisites in a mercantile arbitrator.

Other qualifications are therefore necessary; and these shall be briefly stated:—The first, as a ground-work, is a general knowledge of the law, as it relates to commerce, navigation, marine insurance and shipping. The next essential requisite is, a complete acquaintance with mercantile business, (or, as an old merchant once expressed himself to the author,—“his mind must be rounded by commerce,”) from the most extensive and intricate transactions, down to merchants’ accounts; and this latter, though generally considered as the exclusive province of “an accountant,” must not be treated too lightly;—for who can doubt, that a man well-skilled in figures, might in complicated matters of account, give a turn to a balance, which it would require all the knowledge of an arbitrator equally skilful with himself to unravel and detect: in this acquaintance with mercantile business, we include a competent knowledge of the principal ports and trading countries in the world, and their exchanges, monies, weights and measures, customs of trade, &c. To these must be added, a practical knowledge of ships and sea-voyages;—for, amongst the most prolific sources of arbitration, are captains’ (1) and

(1) On the subject of Captains’ accounts, we take this opportunity to quote an observation of a legal writer,—



owners' accounts. We conclude this list with an indispensable requisite,—which is, a thorough knowledge, not theoretical, but practical, of the business of Lloyd's, comprehending that of an underwriter and of an insurance broker.

The reader may perhaps imagine, that few persons will be found who possess these various, and in many respects opposite qualifications; and he may infer from thence, that few persons are *eligible*, or fit to be professional mercantile arbitrators;—if he do so he will be correct,—for after all that has been said, the greatest and most essential qualifications remain to be enumerated; but these are indeed not to be obtained by study or labour, for they depend upon the moral character of the man, and are obligations imposed upon the arbitrator from the nature of his duty; they are as follow:—a disposition to act on every occasion with the strictest impartiality, without any regard, (at least undue regard,) to the party by whom he is chosen; always recollecting that he is not his agent or

“Captains' accounts should not be allowed *without vouchers*; as the law entertains a very just jealousy of this species of contracts, in which the same person at once incurs and admits his own account; those who are in such circumstances, should be prepared to prove by the most direct evidence, the absolute necessity of the charges incurred<sup>d</sup>.”

<sup>d</sup> 1 Holt, 386.

• 1 Vesey, jun. 226. 9 Vesey, 69. Kyd, 75. advocate, but his judge<sup>a</sup>:—to keep his mind free from prejudice; to weigh well the evidence, whether oral or written; and to be open to conviction; not to determine hastily; but to regulate his conduct by the two great principles which ought to govern in a court of equity,—“justice and utility.” Finally, the object of his wishes ought at all times to be, to act (according to one of the oldest definitions which has been given of justice,) with the constant and perpetual desire of giving to every man that which is due to him<sup>f</sup>.

<sup>a</sup> El. Just. l. 1. t. 1. § 1.

It has been observed by a legal writer on this subject, that, “were the parties submitting always certain of appealing to a judge of perfect wisdom and incorruptible integrity, the system of Awards would be highly beneficial to society;” this, if unexplained, would seem as if intended to discourage such a system altogether, because the learned writer must have been aware, that neither in the present, nor in any other state of society, could any judge, nor even any man, of that description be found; but he qualifies his observation by adding,—“but this system, from the weakness and depravity of men, frequently becomes the instrument of the most flagrant injustice, and the most serious oppression; for,

from the manner in which arbitrations are often conducted, the parties, instead of obtaining a speedy termination to their disputes at an easy expense, are frequently altogether disappointed by having no determination at all, and are often involved in a most expensive and tedious litigation.<sup>s</sup> Kyd, 393. And, a more recent writer on this subject, has judiciously observed to the same effect; alluding to persons undertaking references, without being sufficiently well acquainted with the law and principles of arbitration,—he says, that “the award instead of terminating the difference, often becomes the source of disappointment and irritation, and makes a submission nothing but a costly introduction to a law-suit<sup>h</sup>.” Parker, pref. vi.

## SECT. II.

### OF THE PARTIES REFERING, AND OF THE SUBJECT-MATTER OF ARBITRATION.

#### *Article 1. Of the PARTIES who may submit their Differences to Arbitration.*

It is evident, from the first principles relative to the acquisition and tenure of property, that every man in a free country, who has the legal disposal of what belongs to him, and whom the law recognises as having sufficient freedom and under-

\* 1 Rol. Abr.  
340.

standing for the purpose, may contract to submit to an award<sup>a</sup>. That is, he may agree with another in case of dispute, to have his cause adjudged by a domestic private tribunal instead of a public one. It follows, therefore, that the only persons incapable by law of submitting disputes to arbitration are,—persons under age, (called in law, infants,) and those who are under the controul of another; in other words, persons who are under a natural or civil incapacity to enter into a contract; for, in fact, every one capable of suing and being sued, may be parties to a reference. This alludes to the principals; it is, however, legal in many cases for one person to submit for another. A husband may submit for his wife<sup>b</sup>; a parent or guardian for an infant<sup>c</sup>; one of many partners for the rest<sup>d</sup>; six partners may submit all their differences by three being bound to the other three<sup>e</sup>; a trustee for his *cestui que trust*<sup>f</sup>; an attorney having the management of a cause, for his client<sup>g</sup>, during his absence,—and the court will not set aside such a submission, even upon an affidavit by a party, expressly denying his authority to refer<sup>h</sup>; executors and administrators may also refer the disputes arising out of their respective situations<sup>i</sup>; an agent who underwrites policies of insurance and settles losses for another, has an

<sup>b</sup> 5 Ves. 846.

<sup>c</sup> 1 Wils. 28.  
et al.

<sup>d</sup> 2 Mod. 228.

<sup>e</sup> 1 Brod. & Bing.  
350.

<sup>f</sup> 3 Esp. 101.

<sup>g</sup> 3 Wils. 374.

<sup>h</sup> 3 Taunt. 486.

<sup>i</sup> 1 Term Rep.  
691.

implied authority to refer a dispute arising out of a policy<sup>k</sup>; and in consequence of such implied authority, the submission is binding on the principal alone; though, in general where a man is not *expressly authorised* by another to submit for him, he himself will be bound by the award, and not the principal for whom he submits<sup>l</sup>. Thus, in the above cases, the wife and the infant will not be concluded by the submission of the husband, and parent or guardian, though the latter will be responsible to the opposite party for their default; because, the wife and the infant cannot give an authority which they do not themselves possess; and executors and administrators, submitting to arbitration any disputes between them and others in right of the testator, do it at their own peril. The assignees of a bankrupt cannot legally have a general power to submit matters connected with the estate to arbitration, according to their own discretion; for by statute<sup>m</sup>, the creditors present at any one meeting cannot give such a power; if required, there must be a meeting of the creditors advertised in the gazette, and the purport of it must be expressly stated in the advertisement<sup>n</sup>.

<sup>k</sup> 4 Camp. 163.

<sup>l</sup> 2 Keb. 707,  
718. Kyd, 42.

<sup>m</sup> 5 Geo. II. c.  
50. § 3.

<sup>n</sup> 1 Atkyns, 194

*Article 2. Of the SUBJECTS which may be submitted to Arbitration.*

It will be inferred from the preceding article, that great latitude is given to references; and in fact, every dispute connected with the acquisition and the disposal of property, may be referred to arbitration; as may any questions of law; and all personal wrongs which would obtain compensation by the verdict of a jury, or which might be made the subject of indictment\*. This is the result of all that has been written, (and that is not little,) on the subject<sup>†</sup>.

\* 11 East, 46.  
7 Taunt. 423.

† Kyd, c. iii.  
Cald. c. 1.

We are indebted to the learned judges, who have of late years administered the laws of the country, for an extension of these privileges, and it is but just to say,—that contrary to former practice, they have given every possible encouragement to this mode of settling disputes, often, as has been mentioned before, recommending it from the bench, and putting the most favourable construction on the award; in confirmation of this we may quote a learned chief justice, (Mansfield) who lately said in the court of Common pleas,—“the courts have sometimes been very strongly inclined against awards, as carrying away causes from their own

jurisdiction to the decision of private persons; but they now give these instruments a more liberal construction<sup>1</sup>.”

<sup>1</sup> 1 Taunt. 554.  
& vide Bur.  
Rep. 277.  
<sup>2</sup> Wils. 267.

It is scarcely necessary to say, that the system of references does not extend to the compounding of crime, nor of any action, where it is necessary for the benefit of society that the offender should suffer as a public example: an act therefore, which is liable to an indictment for felony, it would be criminal to submit to a reference. With this exception, there is scarcely any dispute or difference but may be made the subject of arbitration.

### SECT. III.

#### OF THE MODES OF REFERENCE.

There are several modes by which disputed matters may be referred to arbitration,—these are as follow:—

1. By a RULE OF COURT.
2. By a JUDGE'S ORDER.
3. By a DEED under seal.
4. By a STAMPED AGREEMENT.
5. By mutual BONDS.

6. By a written agreement on UNSTAMPED PAPER.

7. By a written agreement on a POLICY of INSURANCE.

8. By PAROLE.

All the above are legal modes of submission. Of the first, viz:—by *Rule of Court* at the sittings of *Nisi Prius*, there are *two* kinds:—the one by consent of the parties, through their counsel, during the trial of the cause, for the purpose of ending the suit without the risk of a verdict; when a jurymen is agreed to be withdrawn: the other for the purpose of ascertaining the damages; when a verdict is recorded for the plaintiff, subject to a reference; which, when the trial is before a special jury, is generally made to one of them; though, when the matters in controversy involve a legal question, the reference is usually to a barrister.

The second mode of submission, viz:—by a *Judge's Order*, is resorted to when a suit has commenced, and before going to trial; but this does not necessarily imply a stay of proceedings in the cause, and, they may go on, unless it be expressed in the order that all proceedings shall

1 2 Lord Raym. cease.  
789. Kyd, 26.

The third mode,—by a *Deed* under seal, is required when a question is depending relative



to an indenture with mutual covenants. Such submission must be in the form of a deed, and have a deed stamp (1) to make it valid; for a specialty cannot be answered but by a specialty <sup>b. 2 Mod. 72. Kyd, 11. a. 2. 54.</sup>

All matters of simple contract,—such as insurance cases, unliquidated accounts, &c. may be submitted by *Agreement*. (2)

The fifth is the customary mode, viz:—by *mutual Bonds*, (3) with a penalty, on condition to be void on performance of the award.

An *Agreement of Reference*, though on *Unstamped Paper* is not illegal, but to make it valid, it must have an agreement stamp, or a deed stamp, according to the nature of the matters referred, as must the award.

An agreement to refer the matters in dispute on a *Policy of Insurance* must have an agree-

(1) The present stamp duty on a Deed is £1. 15. 0. for the first 1080 words, (15 common law sheets) and £1. 5. 0. for every 1080 words after the first. The stamp on an Award is the same as on a Deed.

(2) The stamp duty on an Agreement which shall not contain more than 1080 words is £1. 0. 0.; and if more than 1080 and not 2160 words £1. 15. 0.; if 2160 or more, then a progressive duty of £1. 5. 0. for every 1080 words above the first.

(3) The stamp duty on an Arbitration Bond is the same as on an Agreement.

ment stamp, and the award must have an award stamp, before a *legal* claim can be made; but it is not necessary that there should be a stamp for each sum subscribed by each underwriter; for it has been held, that they have such a community of interests in the subject insured, that if they all agree to refer a demand, one stamp for the agreement, and one for the award is sufficient<sup>c</sup>.

<sup>c</sup> 6 Taunt. 171.  
1 Marsh. 525.

When the agreement to refer is by the last mode, which is merely *verbal*, it may be simply to submit the matters in dispute to the decision of the arbitrators, without an express promise to perform the award, or it may be accompanied by such promise, but the effect is the same in either case, and an action may be maintained on the award<sup>d</sup>. When, however, a parole agreement is reduced into writing, it must be on a stamp according to the nature of the matters referred. Where the submission is verbal, without a proviso that the award shall be made in writing, a verbal award has been held to be sufficient<sup>e</sup>. It may be as well, however, when pen, ink and paper can be obtained, that neither the agreement to refer, nor the award should be verbal.

<sup>d</sup> Kyd, 10.

<sup>e</sup> 3 Buls. 311.

By those of the foregoing modes of reference

which are in writing, it is in the power of the parties to agree, that the submission shall be made a rule of any of his majesty's courts of record which they (the parties) shall choose<sup>1</sup>; except in a case where the matters referred have<sup>2</sup> been previously made the subject of an indictment. But the submission to refer by *parole* cannot be made a rule of court, because the words of the act are, that the parties shall "insert such their agreement in their submission<sup>3</sup>."

<sup>1</sup> Stat. 9, 10.  
Will. III. c. 15.

<sup>2</sup> 1.

<sup>3</sup> 7 Term Rep. 1.

The use of this agreement is, that on either of the parties refusing to submit to the award, the court in which the submission is recorded, will in general, on application being made by the other party, and the usual affidavits put in, issue an attachment to compel the performance; which will be made absolute, if there be no motion for a rule to show cause against it: Though, in all cases it is discretionary with the court to grant an attachment<sup>4</sup>; as the party

may have his remedy in an action on the award. The submission may also be made the rule in a court of equity<sup>5</sup>; and the Court of Chancery will compel by attachment the performance of an award made in pursuance of such submission<sup>6</sup>. It is therefore advisable for the benefit of both parties, whose object must, or ought to be, on entering into a reference, that the matters

<sup>4</sup> 1 Strange, 695.

<sup>5</sup> 1 Bur. 278.

<sup>6</sup> 1 Saund. 326.

<sup>1</sup> Anstr. (Rep. Ex.) 273.

<sup>2</sup> 2 Vern. 444.

in dispute shall be decided and finally put to rest, that this clause should always be inserted in the instrument of reference. But, in regard to the second mode of reference, it has been held, that it is not absolutely necessary that the rule should be made of the same court in which the suit is pending<sup>1</sup>. It should be borne in mind that, according to the statute, it is the *submission* and not the award, which is to be made a rule of court<sup>2</sup>; and that this may be done at any time, (if the courts be sitting,) that is, before the arbitrators commence the investigation, during their proceedings, or after the award is made<sup>3</sup>; but, for reasons mentioned in the next section, it is better that it should be done as soon as it is practicable, after the agreement is perfected.

This statute, which by making the process summary, prevents litigation, and which must be so peculiarly beneficial when generally known, was not, however, obtained without a struggle; for as near to our own times as those of Charles II. the courts were reluctant to grant their interposition<sup>4</sup>;—such a domestic tribunal interfering too much with their legal habits; for it is said, that in more instances than one a judge on the bench,—alluding to references by order of *nisi prius*,—has been heard to

<sup>1</sup> 1 Anstr. 273.

<sup>2</sup> 2 Barnardist.  
163. Str. 1178.  
<sup>3</sup> East, 632.

<sup>4</sup> 6 Vesey, 10.

<sup>4</sup> Vide sup. § ii.

declare, that he never knew any good to arise from them<sup>9</sup>.

<sup>9</sup> Kyd, 31.

In those cases indeed, where from the nature of the business the greatest number of questions for reference occur, viz:—on policies of insurance, it is not customary to insert this clause; perhaps, because such are generally considered as friendly references, and by giving a legal turn to the thing it might have the appearance of intended litigation. Instances have, notwithstanding, come under the author's notice, when such a clause would have been found useful.

In all agreements of reference, where the provisions of the statute have been complied with, it is *imperative* on a court of law or equity, to enter the submission on its record; which is materially different from what might be inferred, from some bonds and agreements of reference drawn up even by lawyers, in which it has been made *optional* with the court,—the words of the agreement being, “if the court shall so think fit,” or “if the court shall so please;” which can only appear with propriety in a judge's order of reference, or in one by rule of court—such references, (*i. e.* while an action is pending,) not coming within the operation of the statute<sup>9</sup>. In an ordinary agreement of reference these words can only tend to mislead.

<sup>9</sup> 2 Ves. jun. 453.

The condition of the printed form of an arbitration Bond is far from being complete; it does not contain the clause, for making the submission a rule of court, (1) though the act expressly gives leave "to insert such their agreement as the condition of the bond;" nor does it contain another clause, which, for the security of the arbitrators, it is of great importance should be inserted in all agreements of reference, viz:—that the parties "will not bring nor prosecute any action or suit in any court of law or equity, nor file any bill in equity, against the said arbitrators, or any or either of them, of and concerning the premises so referred." Neither has it the clause to put the costs of the reference in the discretion of the arbitrator. These very material omissions ought to be attended to, when the printed form is revised and corrected.

It is customary in articles of partnership, and agreements of that nature, to make a provision,

(1) The liberality of the courts, in their construction of agreements of reference, cannot be better exemplified than in the following case,—where the agreement to make the submission a rule of court did not appear in the condition of the bond, but was written at foot, *without being signed*, the court did not refuse the rule,—considering the intention of the parties to be what the writing purported.

\* Barnes, 55.

"that all disputes between the parties relative to their intended transactions in business, shall be referred to arbitrators indifferently chosen," &c. Such a clause is useless. The general principle was settled, in a case where a clause was inserted in a policy of insurance, that "if any dispute should arise between the parties it should be referred to arbitration;" this was held by the court to be nugatory; for without it, the parties might, if they thought proper, submit their differences to arbitration, and with it, neither could compel the other to do so: but in this case the court was of opinion, that if a reference had actually taken place and been determined, or even if there had been a reference depending, this might have been a bar to the action, though the mere agreement of the parties could not exclude the jurisdiction of the court'. For it has been frequently determined, that the authority of the supreme courts of Westminster is such, that nothing but the express words of an act of parliament can take away or abridge their jurisdiction'.

' 2 Bos & Pul.  
135.

' 2 Hawk. P. C.  
286. 2 Bur.  
1042. 8 Term  
Rep. 139. 6 Ves.  
818. et al.

It is not the author's intention to give forms or precedents of agreements of reference, of bonds of arbitration, &c.; these ought to be drawn up by solicitors, attornies or notaries, well

conversant with such matters, for it has been seen that the printed form cannot be depended upon. The condition of the obligation, (or that part of the instrument of submission which gives the power to the arbitrator,) should be as concise as possible, and it is said from authority, that "any words, by which the intention of the parties can appear, are sufficient to make a condition of an obligation".

\* 18aund. 65. The only form which it is thought necessary to give, is that of a reference on a policy of insurance; which in general is as follows:—"We, the undersigned, do hereby agree, to refer all matters in dispute on this policy, to the opinion of A. B. and C. D., with leave for them to choose a third person, should they think it necessary; and, we also agree to abide by their decision, or the decision of any two of them." Lloyd's, . . . . day of. . . . . Signed by the assured, or by the broker for him, and by those of the underwriters who may choose to refer the matters in dispute to arbitration. The award is in general, in the following or similar words:—"We, the undersigned, are of opinion, that the underwriters ought to pay the sum of £—— per cent. in full for all claims on this policy, and cancel their subscriptions." Signed by A. B. C. D., &c. It is evident, however, that every particular reference must be worded according



to the matters in difference, and, if *all* claims are not referred, those which are, must be specified.

It is customary, in references by the *first* and *second* modes, to limit the time for making the award to some one day in the following term; and if the arbitrator wishes it to be prolonged, application must be made to the court, or the judge, for further time. But, in ordinary bonds and agreements of reference, the arbitrator is allowed to enlarge the time to any day he may think fit, by indorsement on the instrument; and it is understood, that this clause in the agreement, though it may be worded so as to enlarge the time only once, shall be interpreted to extend to more than once; on this question one of the late chief justices of the Common pleas (Mansfield) said, "the sense of the condition is,—that he shall have sufficient time to make his award, and that if he cannot make it by the day named, he is to make it at any time he pleases; and whether he names the ultimate day at once, or at a subsequent time, is immaterial." And, it may also be proper to remark, that when the time is enlarged from — until —, the award may be made *on* the last mentioned day. The time for making the award ought, indeed,

<sup>v</sup> 1 Taunt. 509.

<sup>4</sup> id. 658.

<sup>v</sup> 3 Br. ch. ca. 358.

never to be *fixed* in the instrument of reference, whether the arbitration be by rule of court or by the ordinary mode. One of the judges of the court of King's bench lately said,—“this term ought never to be inserted in orders of reference, but it should be left to the discretion of the arbitrator alone, to enlarge the time as he may

\* 1 M. & Sel. 1. require\*.” (1) In all cases, where the time is not limited, a reasonable time is always understood; but on this subject see the next section.

Much has been said in the courts of law and equity, and quotation might be heaped upon quotation if necessary, on the subjects of *umpires* and *umpirages*, but as these terms are almost unknown, and are certainly not now used in mercantile references, the author will spare the reader and himself the trouble of going into the detail. The custom is, for the two arbitrators to choose a third; and the words in the agreement usually are,—that “the award shall be made by them the said arbitrators, or any two of them;” thus, the whole of the three retain their authority until the award is made; but an

(1) It is not necessary to state in an award the having enlarged the time, for the day to which the time for making an award is enlarged is immaterial and need not be proved.

\* 1 Goss. 5.  
 2 Saund. 290.  
 3 Pri. 54.

~~umpire~~ is in the nature of a judge between the two original arbitrators; which, to say the least of it, is an obnoxious office; the third arbitrator is chosen to assist the other two, and, if they differ, to bring the matter to a close by signing the award with either of them.

#### SECT. IV.

##### OF THE REVOCATION OF THE INSTRUMENT OF REFERENCE.

Every kind of authority is in its nature revocable, though even intended to be made irrevocable by the express words of the agreement<sup>a</sup>. Dig. l. iv. t. 8 § 27.  
But the instrument of revocation must be of as high a nature as the submission itself; for instance:—if the submission be by deed under seal, the revocation must also be by deed<sup>b</sup>; if the agreement be in writing, it cannot be discharged by word of mouth; according to the general principle of law, that every power, authority, or obligation must be discharged with the same solemnities and formalities with which it was constituted; but if the submission be verbal, the revocation may also be verbal<sup>c</sup>; and in such<sup>d</sup>. 5 Co. 26. Brownl. 62. 2 Keb. 64. 79.

a case one of the parties saying to the arbitrators,—“I discharge you from proceeding any further,” will be sufficient to revoke their

<sup>d</sup> Kyd, 30.

authority <sup>d</sup>.

If the submission be by bond, with a penalty, it is forfeited by the party who revokes the sub-

<sup>e</sup> Dig. l. iv. t. 8. mission <sup>e</sup>. But, in case the time is not limited  
<sup>f</sup> 30. <sup>g</sup> Kcb.  
<sup>h</sup> 745. <sup>i</sup> East, in the bond, and a considerable portion of time  
<sup>j</sup> 607.

has elapsed, during which (from the nature of the case,) the arbitrator might have made his award if he had so chosen, then, it is material to know,—that if either of the parties shall give him notice in writing, to the purport, that if he does not make his award within a reasonable time after such notice, he (the party) will revoke his submission,—he who gives such notice, is not bound by the award, if made after a reasonable time has elapsed, and a notice of revocation has been given in consequence, nor will a forfeiture

<sup>k</sup> 2 Keb. 10. 20. be incurred of the penalty on the bond <sup>l</sup>.  
<sup>m</sup> 3 M. & Sel. 145.

Though one of the parties to an agreement of reference revoke his authority, the arbitrators are right in afterwards proceeding to an award; because the party continuing in submission, is entitled to his action for damages for non-performance of the covenant to abide by the award.

Until the submission has been made a rule of court, it has the binding force of an agreement only, to submit to the award of the arbitrators, whose authority is in its nature revocable, and therefore, after a party has revoked the authority of the arbitrators, they cannot make an award to bind him; but after the submission has been made a rule of court, the party cannot rescind it without incurring a breach of that rule <sup>s</sup>. This is <sup>s</sup> 7 East, 607. a good reason for making an agreement of reference a rule of court as soon as is convenient, or the courts shall sit, after the execution of it.

It is a general rule, that the authority given by any man ceases at his death; if therefore, one of the parties die while the reference is pending, that is,—before the award is delivered, the submission is vacated <sup>b</sup>; which accords with the <sup>b</sup> Barn. 210. maxim in regard to suits at law,—*actio person-* <sup>1</sup> Marsh. 366. <sup>2</sup> B. & Ald. 394. *alis moritur cum persona*. And it has been said, that if a reference be entered into by one who should become a bankrupt before the award is made, the arbitrators cannot proceed; for it is also a rule, that the authority given by such a one ceases on his bankruptcy <sup>i</sup>; but it would <sup>i</sup> 6 Taunt. 448. seem to be only so in a reference under the statute; for in a reference by *rule of court*, the bankruptcy does not operate as a revocation, because it would not have put an end to the

suit which the bankrupt had previously instituted; for bankruptcy does not produce in law a civil death of the bankrupt's rights<sup>k</sup>. But, (as it regards the death of the parties,) if a verdict be taken subject to a reference, to determine the amount, such reference being authorised by an order of *nisi prius*, and subsequently made a rule of court, though one of the parties should die while the reference is pending, the award is to be considered as having relation back to the time of the verdict, and is valid; (1) for the principle is this:—by consent of the parties, an arbitrator is, at *nisi prius*, substituted in the place of the jury; and when an award is made, the verdict must be entered so as to correspond with that award<sup>l</sup>; and the true meaning of a *rule of reference* is, that the parties consent that the arbitrator shall mould the verdict which has been taken; and, that the verdict so moulded by him, shall be taken to be the verdict which the jury should have found<sup>m</sup>.

<sup>k</sup> 3 B. & Ald. 250.  
<sup>l</sup> 3 B. & Pul. 244.  
<sup>m</sup> 7 Taunt. 574. n.

<sup>n</sup> *idem*, *ib.*

(1) The courts of King's bench and of Common pleas have been at variance in their decisions on this subject. There appears to be no doubt that the death of one of the parties operates as a revocation, where no verdict is taken, but merely a juror has been withdrawn.—But in the case of a verdict being taken subject to a reference, the court of King's bench was of opinion that an award made after the death of the party was good in law<sup>n</sup>.

<sup>n</sup> Cald: 30.

The verdict is therefore taken *pro forma* subject to the award of the arbitrator °.

° 7 Taunt. 571.

If an unmarried woman submit to arbitration, her marriage operates as a revocation of the submission, not only on her own part, but on that of any other person who may have joined with her in the reference; for marriage is in law a civil death of all the woman's rights<sup>p</sup>.

<sup>p</sup> 2 Keb. 865.  
W. Jones, 368.  
388. 4 B. &  
Ald. 250.

It has been said, that an agreement of reference under the statute, before it has been made a rule of court, may be revoked, it having then the binding force of an agreement only; and the reason is,—that the submission itself being to be made the rule, when *that* is revoked there is nothing remaining to make a rule of court: but it is not so in a reference by a judge's order, for in this, though the party may revoke his submission, he cannot revoke that part of the order which relates to the costs of suit<sup>q</sup>; and, as<sup>r</sup> 2 B. & Ald. 395. it is in the power of the court to make the order a rule of court, if it shall so please, (without reference to any statute,) it will be done of course; for, how can the court form any judgment of what costs are reasonable and just, unless the order be made a rule of court<sup>r</sup>?

<sup>r</sup> *id. ib.*

## SECT. V.

## OF THE PROCEEDINGS OF THE ARBITRATORS.

The first proceeding is, to read over the bonds or agreements of reference, to ascertain that they are worded correctly, and particularly, that they contain the clause mentioned in Section III. which protects the arbitrators against any action at law, or suit in equity, in consequence of their award. When the reference is to two arbitrators, the next proceeding is to choose a third; and it is often made imperative that this shall be done before the commencement of the proceedings. But whether it be imperative or not, it is always advisable, that the third should be chosen before an opportunity occurs of any difference between the two named in the agreement. The courts of law also consider this as the fairest mode, and recommend it accordingly \*. Besides which, the propriety cannot be questioned, of the third arbitrator hearing the evidence from the commencement with the other two. It often happens, however, that there is a little difficulty in determining on who shall be the third person; each arbitrator, of course, wishing to have the one of his own nomi-

\* 2 Term, 64.



nation: in such a case, it is the custom for each to write a name on one, two, or three slips of paper, and draw lots for the person. It is proper to be known, that this mode of choosing a third is legal. Three cases which bear upon the subject, are reported in the law books; in two, the mode adopted of choosing a third arbitrator (or umpire) was held to be bad, but in the third, (the difference between which and the other two is scarcely perceptible to any one but a lawyer,) it was considered as good. In the first case, the tossing up a piece of money to ascertain which arbitrator should name the third, was held to be bad <sup>b</sup>. Of the other two cases <sup>b</sup> 2 Vern. 485. which are more modern,—one was in the Common pleas and the other in the King's bench: in the former, the drawing lots for which should have the nomination of the third person, was also held to be bad <sup>c</sup>; (1) the other case, where the <sup>c</sup> 2 B. & Ald. 918.

(1) It is a curious fact, that on a subject of so much greater importance than any civil arbitration, viz:—that of the conviction of the inhuman wretches engaged on the coast of Africa in the infamous traffic in slaves,—the drawing lots for an arbitrator by the two judges, (the one appointed by England, and the other by the power interested in carrying on the trade,) is legal. Which is about as consistent with justice, as if a jury were to toss up for a verdict. See the *Papers relating to the Suppression of the Slave Trade*; lately printed by order of the House of Commons.

appointment was considered by Lord Ellenborough to be good, is as follows:—"The arbitrators named different persons, but each preferring the one named by himself, though not disapproving of the other, they determined to toss up which of the two nominees should act, and the person upon whom the lot fell, together with the arbitrator who had named him, made the award, without the other first-named arbitrator joining in it."—Lord Ellenborough said, "this is not a tossing up between the two arbitrators, which should nominate the third, in exclusion of the other, which would have been bad, according to the cases cited; but, after having each of them nominated one, and each of them thinking that the nominee of the other was *nearly as proper as his own*, (1) they agreed to submit their opinion to this mode of selection of one, out of the two, fit persons. I cannot see any objection to this. The mode of appointing twelve jurors, out of all those who are returned to serve, is by lot<sup>d</sup>." It appears therefore, that the award is not good in law, if the two arbitrators toss up, or draw lots for the nomination of the third, but that *it is*, if they each name one, and then draw lots which shall be

<sup>d</sup> 16 East, 51.  
Cald. 87.

(1) But query—how does this appear?

appointed. On the first case cited, the judge observed, that the choice ought to be fair and impartial, and ought not to be left to chance ; it should be an act of the will and the understanding, but in the case of drawing lots or tossing up who shall name the third, the arbitrators follow neither <sup>c</sup>. (1)

<sup>c</sup> Kyd, 76.

These preliminaries being settled, the appointment ought to be indorsed on the instrument of reference', which appointment, it is <sup>' 4 Camp. N. P. C. 17.</sup> scarcely necessary to say, does not need an additional stamp, though this, as relates to the appointment of an umpire, was till lately doubted <sup>ε</sup>.

<sup>ε</sup> 4 Taunt. 704.

The next step is, to send notice to the parties, or their solicitors, to attend on a certain day and hour, with their witnesses and documents. At that meeting, the first thing usually done, is to examine the jurats, and see that the witnesses, and the parties, (if necessary,) have been regularly sworn according to the terms of the order, or the agreement of reference. If the arbitration be by rule of court, or a judge's order, the oath must be made before one of the judges of the same court by which it is issued ; but if the submission be under the statute, that

(1) Does not this reasoning apply to the last case cited as well as to the other two ?

is,—by bond or agreement; and the provision be not made for the oath to be taken before a judge, then it may be before a magistrate, or any person duly authorised to administer an oath. And it may here be necessary to remark, that a party while attending an arbitrator, appointed by a court of law or equity, is free from arrest by

<sup>b</sup> 3 Vesey, 350. civil process<sup>h</sup>. For the proceedings of the arbitrators after this, of course no rules or precedents can be given, as they must entirely depend upon the nature of the subject referred. But it may be well to know, that an arbitrator is bound to examine the witnesses on both sides, and in the parties' presence, if required, or the  
<sup>i</sup> 4 Pri. Ex. 432. award will be set aside<sup>i</sup>.

The meeting may be adjourned from time to time at the discretion of the arbitrators; they taking especial care that the award is made before the time limited by the agreement, or the prolonged time as enlarged by themselves, has

<sup>k</sup> Vide sup. § iii. expired<sup>k</sup>. Here it is necessary to observe, that the signatures to the prolongation of the time should be witnessed; because the fact must be verified, before the court will grant an attachment for non-performance of an award<sup>l</sup>, and the witness must make *affidavit* to this fact; the affirmation therefore of a quaker would not be considered sufficient to ground an attachment

<sup>l</sup> 8 East, 12.  
<sup>1</sup> Marsh. Rep.  
379.

for non-performance of an award<sup>m</sup>. If the time <sup>= Tidd. Prac. 631.</sup> for making the award is not limited, a *reasonable* time is always assumed, and what is a reasonable time is in the breast of the arbitrators<sup>n</sup>.

<sup>n</sup> Vide sup. § iii.

Should either of the parties refuse to attend the meetings of the arbitrators, after due notice given to him, the proceedings may go on *ex parte*<sup>o</sup>; but as this obnoxious step ought not to <sup>• Ca. L. & Eq. p. 2. 63.</sup> be taken hastily, it should be carefully ascertained that the party absenting himself has been duly served with a notice in writing of the place and time of meeting. It is reported to have been said in court by Lord Hardwicke, that “arbitrators are not bound to give notice to the parties of the time and place of meeting<sup>p</sup>.” <sup>• 3 Atk. 592.</sup> But this doctrine is so unreasonable, that there is no doubt that an award made, without due notice being given to the parties, of the meetings of the arbitrators, would now be set aside; and so would an award made by two of the arbitrators, without giving the third an opportunity to be present, and without giving him due notice of their meetings<sup>q</sup>.

<sup>q</sup> Barnes, 57.

The last meeting of the arbitrators is, for the purpose of giving instructions for drawing up the award, which will be treated of in the following section. But before we conclude this,

a few words may be said on the fees of the arbitrators; or, as they are technically called,—*the costs of the reference*,—though these include also the charge for the award, which is always drawn up, (or ought to be,) by a professional person *employed by and paid by the arbitrators*.

Arbitrators' fees, like those of barristers and physicians, are strictly gratuities; and like those, they cannot be sued for; it being a general rule in law, that recompense cannot be demanded unless previously stipulated for. A solicitor may charge for his attendance, advice and trouble; an accountant for work and labour, and business done; but, (as it has been laid down by an eminent Scotch judge,) "the office of an arbitrator is absolutely gratuitous,—for an arbitrator is selected for integrity, impartiality and ability, which cannot be appreciated, and do not therefore admit of recompense;" and this is now the

\* Park. not. arb.  
71. 116.

\* Com. on Con.  
388. 4 Esp. N.  
P. C. 47.

law of Scotland'. Comyn says, "an action will not lie for business done as an arbitrator, unless there be an express promise to pay him a sum of money for his trouble'." This is, therefore, also the law of England; and it is a sufficient reason for a clause to the following purport being always inserted in the bond or agreement, viz:—"the costs of the reference shall be in the discretion of the said arbitrator, (or 'the said

arbitrators, or any two of them,' as the case may be,) who shall direct and award by whom, and to whom, and in what manner the same shall be paid." For a general reference of all disputes, differences and demands does not confer on the arbitrator a power to award "the costs of the reference," as they cannot be brought under the head of "disputes, differences, or demands" between the parties previous to their entering into it. It was formerly held, that if the award were of the costs of suit and of the reference, then *only the costs of suit* could be taxed, because the master could not judge of the costs of reference; but it is now determined, as far as relates to references by order of *nisi prius*, (and it ought to be so in all others,) that an arbitrator has not an unlimited power to charge what he pleases for his trouble; for, if his charge be excessive, the court will interfere, and direct the master, or the prothonotary to allow what is reasonable; otherwise, as the court observed, "an arbitrator would be judge in his own cause, which could never be admitted." The word "costs," when expressed generally in an order of reference, that they "shall abide the event of the award," applies to the costs of the reference, as well as to the costs of suit; and

<sup>7</sup> Term. R. 213.

<sup>5</sup> Willes, 62.  
Barn. 58.  
Styles, 459.

<sup>7</sup> Barn. 58.  
Kyd, 135.

<sup>3</sup> Taunt. 461.  
<sup>5</sup> id. 343.

<sup>9</sup> East, 436.

if no directions be given by the arbitrator respecting the costs of the reference, they are to be paid by both parties equally'. The practice is, for the notary or the solicitor, who is employed by the arbitrator, to give notice to the party whom he, (the arbitrator,) may determine shall pay the charges of reference, to take up the award, and it is held by him, (the notary or solicitor,) until the charges are paid. The party who takes up the award, is generally the one who is to be benefited by it, or in whose favour it is made.

A few words more may be said on the *costs*. In a late cause it was determined, that where, on a submission by rule of court, the costs of the cause were by the order of reference to abide the event, but the costs of the reference, and of *the special jury*, obtained upon the motion of the defendant, to be in the arbitrator's discretion; the court held, that the meaning was,—that the arbitrator should have the power of allowing the costs of the special jury as costs in the cause, if the party *who moved for the same* should succeed\*. In another case, where the costs were to abide the event, the arbitrator directed certain acts to be done, but awarded no damages, and that each party should pay his own costs and a moiety of

\* 1 ScL. & Barn.  
663.



the award; it was held, that "the event" meant the *legal* event, and the arbitrator having awarded no damages, he could not give any directions as to the costs\*.

\* 1 Ch. (K. B.)  
183. & vide 3  
Term. Rep. 139.

## SECT. VI.

### OF THE AWARD.

In the preceding sections the author has endeavoured to place before the reader, in a small compass, divested of legal technicalities, and as much as possible of legal quotations,—the Law and the Practice of Arbitration,—up to the final end of all arbitrations—THE AWARD. This is indeed the principal thing to be attended to, and must not be made hastily, but with mature deliberation: for if this be not properly conceived and worded, the labours of the arbitrators, and the trouble and anxiety of the parties, will have been worse than uselessly employed.

The last meeting of the arbitrators is held for the purpose of giving instructions for the award. The drawing it up should be confided, as before mentioned, to a notary or a solicitor employed by themselves, and who is in the habit

of arranging these matters. But it is no objection to the award if it be prepared by the solicitor of one of the parties<sup>a</sup>.

<sup>a</sup> 9 Ves. 67.

The first thing to be done, is to read over attentively the agreement or instrument of reference, that the award may be made in conformity thereto; and on this subject, we cannot do better than use the language of one of the present learned judges of the court of Common pleas; for such authority ought of course to have greater weight than any other:—Mr. Justice Richardson said on a late occasion,—“What is the nature of an award? It is a decree made by a judge or judges, deriving authority from the choice of the parties. The power of such judge or judges to decide, and the duty incumbent on the parties to obey the decision, arise *solely* from the contract of submission: the submission must therefore in every case be examined for the purpose of seeing what the contract is, and by whom, and with whom, and for what end it is made<sup>b</sup>.”

<sup>b</sup> 1 Brod. & Bing. 350.

For though, as it has been observed, the power of the arbitrator is great, it is only comparatively so, it being always *limited* by the instrument of submission; and, an award made of any thing not connected with the subject of dispute, is not binding on the parties<sup>c</sup>.

<sup>c</sup> Kyd, 145.

It is impossible, therefore, to give any specific rules for drawing up an award, as this, like the proceedings of the arbitrators, and the condition of the obligation<sup>d</sup>, must depend entirely upon<sup>d</sup> the nature of the matters submitted. It may<sup>Vide sup. § iii. & v.</sup> however be observed, that the language should be as clear, and explicit, and definite as possible; and if the arbitrator be not conversant with the terms of law, he should take great care that he perfectly understands the words which the notary or solicitor uses, and that they bear precisely the sense which *he* intends they should convey: for though, from the liberality of the judges, a reasonable construction is always put upon an award, (they considering an arbitration as an instrument to make peace, and put a perfect end to matters in controversy<sup>e</sup>;) he<sup>e</sup> must not be too much led away with the idea, that<sup>3 Bulst. 65. 1 Vern. 259.</sup> the courts will interfere to relieve him from any difficulties which he may be brought into, by employing an incompetent person to frame his award. One thing the arbitrator should most carefully attend to, which is,—never to suffer his reasons to appear on the award, nor, (if possible to avoid it,) to be known; they should be, if only from prudential motives, for ever locked up in his own breast; and he is not compellable by law or equity to discover them<sup>f</sup>; according<sup>f</sup> 3 Aik. 644. & ut sup. § 1.

to the definition before given,—that he is an arbitrary judge, from whose sentence there lies

\* El. Just. l. iv. no appeal §.  
1. G. § 31.

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The first and the principal object which the arbitrator should have in view, after that of making a just, true, and conscientious award, is that of making *such an one as will stand good in law*. The object of the author, in the remainder of this article, will be to endeavour to facilitate that end.

According to what has been said above, the FIRST RULE is,—that *the award shall be made strictly* IN CONFORMITY TO THE SUBMISSION; for this, and this alone, must determine the intention of the parties; and although it is a general rule that,—“*omne actum ab agentis intentione est judicandum*,” and in all contracts the law looks to the intention of the parties,—yet it is only from the words of the instrument, that the arbitrator will be allowed, in making his award, to judge of that intention; any explanation therefore, that the parties themselves may give of their intentions, if such explanation at all differ from the words of the submission, must stand for nothing; for the arbitrator's power

being derived from the agreement is also confined by it<sup>h</sup>, and it is not consistent with reason to imagine, that he will be permitted to go beyond it. <sup>h</sup> Dig. l. iv. t. 8. § 32. n. 15.

When it is said, that the award must be strictly in conformity to the submission, the following inferences will be drawn;—*first*,—that it must not extend to any matter beyond the submission; and, *secondly*,—that it will not be allowed to affect the rights of persons who are not parties to the submission.

Under the *first division* of the rule, the following quotations will be sufficient to illustrate the principle<sup>i</sup>. If the submission be confined to a particular subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void, as far as it respects them<sup>k</sup>. <sup>i</sup> Kyd, ch. v. <sup>k</sup> 2 Mod. 309.

If the submission, therefore, be by rule of court, the order in which the words are placed is to be particularly attended to: for if the reference be,—“of all matters in dispute between the parties,”—the power of the arbitrator is confined to the matters in dispute in that suit; but if it be,—“of all matters in difference between the parties in the suit,”—his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them<sup>l</sup>. <sup>l</sup> 2 Bl. Rep. 1118. 2 Term Rep. 644. Idem, 626.

By a submission "of all actions personal,"—the arbitrators have no power to make an award of any thing in which the parties have only a cause of action. If the submission be,—  
 "of all actions personal, suits and complaints," the word "personal" extends to suits and complaints; and consequently, an award of all actions real is beyond the submission; but if it be, "of all actions personal, *and* suits and complaints," the word personal does not extend to the latter part; and an award on such a submission may comprehend actions real. If the submission be,—  
 "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands," an award "to release all bonds, specialties, judgments, executions, and extents," is within the submission; for as all debts are submitted, the arbitrators have power to make their award concerning the debts themselves, and of course to award a release of every thing by  
 - 2 Saund. 190. which they are secured<sup>m</sup>. Where the submission is,—  
 "of all debts, trespasses and injuries," an award "to release all actions, debts, duties and demands," is good; for the word "injuries"  
 - 3 Bulst. 312. is sufficient to comprehend all "demands".

If, under a general reference, two partners refer all matters in difference between them, it

is in the power of the arbitrator to award a dissolution of the partnership °.

° 1 Bl. Rep. 475.

The *second* division of the rule is,—that the award ~~must~~ not extend to any one who is a stranger to the submission °. The decisions on this subject chiefly relate to conveyances of land, and other matters connected with the disposal of real estates, which it is not necessary to notice: but in general, a distinction is taken between the case of an act awarded to be done by a stranger, and that of an act awarded to be done to the stranger, by a party to the submission. In the latter case the award is said to be good; and if the stranger will not accept the money awarded to be paid to him, the party's obligation is saved °.

° 3 Leon. 62.

If the persons comprehended in the award were in contemplation of the submission, though they were not directly parties to it, yet the award is good; as,—if it be awarded that all suits shall cease between the parties, or any others in their behalf °.

° 3 Latw. 530.

The award of payment of money to a stranger is generally void °; but this must be understood ° to hold, only when such payment can be of no benefit to the other party; for an award that one of the parties shall pay so much to a creditor

° Godb. 12.

of the other, in discharge of a debt due by the other to that creditor, is unquestionably good<sup>1</sup>; as is also an award to pay a sum of money to the party's solicitor, or banker, on his account or for his benefit<sup>2</sup>.

<sup>1</sup> 1 Ld. Raym. 123.

<sup>2</sup> Id. 5.

But, as the award of a thing out of the submission cannot be enforced by an action at law, so, neither shall a man by such an award be precluded from claiming his right in equity<sup>3</sup>. Nor shall an award affect the rights of persons not parties to the submission<sup>4</sup>.

<sup>3</sup> Ca. Temp. Fin. 141. Saund. 32. 33.

<sup>4</sup> Id. 180. 184.

In the *third* place, when it is said, that the award must be in conformity to the submission, it is meant,—that if the submission be conditional, “so as the arbitrator decide of and concerning the premises,” (that is, with the clause as it was formerly called, “of *ita quod*,”) (1) he must decide upon each distinct matter in dispute of which he has notice<sup>5</sup>. And, if it be provided, that “the same award shall be made on or before” a particular day, in this a condition is implied, that it shall be made “of and concerning the premises;” (the word “*same*,” having a reference to every thing before mentioned,) and,

<sup>5</sup> Dyer, 216.

Lutw. 554.

<sup>6</sup> Brownl. 309.

(1) *Ita quod fiat de præmissis*. These were the words made use of in the old legal instrument of submission to arbitration;—thence called, “the clause of *Ita quod*.”



the obligation upon the arbitrator to decide expressly each point submitted to him, has full force'. But, where a reference was made by rule of court, "of all matters in difference," and the award only directed that a verdict should be entered for the plaintiff, this award was held to be good,—though it *did not state* that it was made "of and concerning the premises".

Lutw. 202.  
Willcs. 268.  
7 Mod. 349.  
7 East, 80.  
Cald. ch. v.

\* 1 Keb. 790.  
863. 1 Sel. &  
Bar. 106.

But in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party complaining must distinctly show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. The courts will require evidence of this, and will not set the award aside on presumption\*.

\* Rol. Arb. B.  
24. Cald c. v.  
& vide sixth rule  
ut infra.

The SECOND RULE is,—that the award *must not be of things IMPOSSIBLE to be performed*. According to the law maxim,—"*Lex neminem cogit ad impossibilia*." It certainly appears to be one of the most justifiable reasons for setting aside an award, that it directs a thing to be done, which is in its nature physically or morally impossible.

Under this head few cases have been deter-

mined, but the following may be quoted to illustrate the principle, *e. g.* where a party was directed to give up a deed which was in the custody of a person over whom he had no controul<sup>b</sup>; or, where it was ordered that he should procure a person to be bound for him, for a sum of money<sup>c</sup>; or, that the defendant in a cause should be bound with sureties which the plaintiff should approve,—because it may be impossible to force the approbation of the plaintiff<sup>d</sup>. Such, and similar awards, would be set aside. But this doctrine must not be supposed to extend to a case, where a man is ordered to pay a sum of money, and he has not that sum in his possession, nor any means of obtaining it,—against such an award a party will not be allowed to plead impossibility; for in order to vitiate the award the impossibility must arise *ex natura rei*<sup>e</sup>.

THIRDLY, the award must be REASONABLE. This follows from the instrument itself; for the power given to an arbitrator to determine what he shall think fit to be done, must be confined to reasonable acts<sup>f</sup>.—Whatever is unreasonable is unjust; the law says, “whatever is inconvenient and contrary to reason is not permitted.” But it will not of course be inferred

<sup>b</sup> 12 Mod. 585.

<sup>c</sup> Rol. Arb. F. 2. 3. 4.

<sup>d</sup> 3 Mod. 272. Kyd, c. v.

<sup>e</sup> Cald. ch. v.

<sup>f</sup> 5 Taunt. 460.

from this, that the parties, or any one but the courts of law, are to be the judges of what is reasonable; and a clear case of unreasonableness must be made out to the satisfaction of the courts, before they will interfere to set aside an award on that ground. As it is the duty of an arbitrator to judge impartially, *he* must determine for himself what is reasonable, and no specific rules can be given to guide him;—but in general, if the award be extravagantly disproportioned to the circumstances of the case, performance will not be enforced<sup>5</sup>. Where, how-

ever an arbitrator decides a question of law, the courts will not enquire whether it be unreasonable<sup>h</sup>; for, where a point of law is referred to an arbitrator, the parties are bound by his decision, whether right or wrong, unless fraud or corruption is imputable<sup>l</sup>.

<sup>5</sup> Rol. Arb. F. 1.<sup>9</sup> Mod. 63.<sup>3</sup> Chan. Rep. 76.<sup>2</sup> Vern. 251.<sup>h</sup> 1 Swan. 53.<sup>l</sup> Wils. 34.<sup>l</sup> 6 Ves. 282.<sup>9</sup> id. 364.<sup>2</sup> Madd. 6.

**FOURTHLY.** An award must *not be contrary to LAW*. This rule has some limitation, and must not be construed strictly. In a case where no lawyer could doubt upon the point of law, the following distinction was laid down by the court of King's bench:—that where the arbitrators meaning to follow the law, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that

mistake: but where, knowing what the law is, or laying it entirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award, that in some particular point it is manifestly against law<sup>k</sup>. But Lord Hardwicke said, "if the arbitrators appear to be mistaken in a doubtful point of law, the award may be permitted to stand, though the court should be of a different opinion from the arbitrator<sup>l</sup>. And in a late case the court of King's bench decided, that an award could not be set aside on the ground merely that an arbitrator was mistaken in a point of law; for in such a case it must be satisfactorily proved that he would not have made such an award if he had known what the law was<sup>m</sup>. Neither will an award be set aside, if the arbitrator in a matter of mixed law and fact mistake some of the points<sup>n</sup>. It was indeed well and liberally observed from the bench on a late arbitration cause, that "it is always painful for the courts to give a judgment upon strict legal and technical objections against the real justice of the case, but they are always pleased when giving effect to what justice requires will violate no rule of law<sup>o</sup>. The general principle is,—that the award must not be contrary to any

<sup>k</sup> Kyd, 351.

<sup>l</sup> 3 Atk. 462.  
(495.)

<sup>m</sup> 3 B. & Ald.  
237.

<sup>n</sup> 6 Taunt. 255.

<sup>o</sup> 1 Brod. & Bing.  
830.

clear, well-established and defined point of law<sup>1</sup>; <sup>13 B.&Ald. 237.</sup>  
 for neither the courts of justice, nor an arbitra- <sup>6 Taunt. 255.</sup>  
 tor, can be allowed to depart from the rules  
 which are founded on the immutable principles  
 of justice; and, if an arbitrator act contrary to  
 a known general law, it is undoubtedly the duty  
 of the court to set aside his award<sup>2</sup>. Where, <sup>12 B.&Ald. 691.</sup>  
 for instance, an arbitrator ordered a party to do  
 a thing which would make him liable to an ac-  
 tion,—the court set aside so much of the award,  
 saying, that they could not allow a party to an  
 award to be attached on one side, for not doing  
 that, for which, on the other side, he might be  
 sued<sup>3</sup>. If an arbitrator, after making an award, <sup>5 Taunt. 454.</sup>  
 says,—“I meant to make my award according  
 to law, and have misconceived the law,” or “I  
 have mistaken the fact,” his award will be set  
 aside<sup>4</sup>. An arbitrator is not however to be <sup>1 Taunt. 48.</sup>  
 confined by rules of strict law,—Lord Talbot  
 said, “Arbitrators are in the nature of judges,  
 and in some respects have a greater latitude,  
 not being confined within the rules of law or  
 equity, and therefore may make such allowances  
 as cannot be made in courts of judicature<sup>5</sup>.” <sup>2 Eq. Ca. ab. 80.</sup>  
 In a reference of “all matters in difference” an  
 arbitrator ought to consider not *legal* demands  
 only, but also equitable demands, demands of  
 all sorts<sup>6</sup>. Nor, is an arbitrator to be confined <sup>1 Taunt. 48.</sup>

by the practice of the courts of law ;—for where arbitrators had awarded interest on particular sums (1) contrary to an established practice of the courts, the court of King's bench refused to set aside the award on that ground, observing that an arbitrator is not bound by the strict rules of practice, but is to do justice between the parties, according to the particular circumstances of each case v.

v B. & Ald.  
691.

Finally,—it may be remarked,—that an award is similar to a verdict, (*vere dictum*) for an award no more than a verdict, can make that good which is not good in law, else an arbitrator would be paramount to the law, which can never be permitted.

The FIFTH rule is,—that the award shall be CERTAIN. The Roman law says, “a judge ought always to take as much care as possible so to frame his sentence, that it may be given for a thing or sum certain; although the claim upon which the sentence is founded, may be for an uncertain sum or quantity v:” and it may be remarked, that the only motive which can influence a man to refer any subject of dispute to

v El. Just. l. iv.  
c. 6. §. 32.

(1) The allowance of interest is peculiarly the subject for the consideration of an arbitrator, for *interest is the damage for the detention of a debt* x.

v C. J. Abbott.

the decision of an arbitrary judge, is to have an amicable and easy settlement of something which is in its nature uncertain <sup>y</sup>.

<sup>y</sup> Kyd, c. iii.

It has been before observed, that the words of the award should be clear, definite, and explicit; to which we may add, that the purport ought to be so plainly expressed, that there may be no uncertainty in what manner the parties are to put it in execution, but that they may know precisely, what it is they are ordered to perform <sup>z</sup>. It ought to be so expressed, that no <sup>z</sup> Kyd, c. v. reasonable doubt can arise upon the face of it, as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties <sup>z</sup>.

<sup>z</sup> Rol. Arb. 21.  
Burr. 275.  
Cald. 104.

To elucidate this rule we quote the following cases. An award was held not to be certain which directed, that one of the parties should deliver up to the other "a certain writing obligatory, or a certain bill obligatory, which he had before;" this was held to be altogether uncertain, for it did not say of what sum, nor of what penalty the bond was, nor of whom it was obtained <sup>b</sup>. And, the same was held of an award, <sup>b</sup> 1 Ld. Raym. 124. "that one of the parties should give security for the payment of a sum of money, either in one gross sum, or at different specific times, or annually for life," because, it is said, he can-

\* Bulstr. 260.  
Cro. Jac. 314.  
2 Str. 1024.

not tell what kind of security is meant, whether by bond or otherwise<sup>c</sup>. An arbitrator, on a reference by rule of court, awarded that the defendant should pay to the plaintiff, "so much for each quarter, as a quarter of malt was then *sold* for;" the award was held to be void for uncertainty, because it was not mentioned in what place the price was to be taken<sup>d</sup>.

<sup>d</sup> Lutw. 550.  
Rol. Arb. 2. 7.

\* Kyd, 198.

But in general, if the matter or thing to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, the objection will not prevail<sup>e</sup>. For, in the construction of an award the courts are bound, so far as the terms will admit, to give to it such a meaning as will render it conclusive<sup>f</sup>.

<sup>f</sup> 1 Swanst. 53.  
1 Wils. 34.

Here it may be noticed, that the circumstance of an award being in the *alternative*, will not invalidate it, for no doubt can arise on a direction, that a party shall perform one of two things, though it be left for him to determine which he will perform<sup>g</sup>.

<sup>g</sup> Leon. 140.  
12 Mod. 586.  
1 Taunt. 549.  
Cald. 107.

SIXTHLY, the award must be FINAL. This is recognised by the Roman law as the principal object of all arbitrations<sup>h</sup>. No rule can indeed

<sup>h</sup> Dig. l. 4. t. 8.  
§ 37.



be better founded than this. An award however, will rarely be set aside on this ground, where it is the evident intention of the arbitrator, that the matters in difference should be laid at rest; and where the award is final, as far as, under the circumstances of the case, might be reasonably expected<sup>1</sup>.

<sup>1</sup> Cald. iii.

The award "that all suits shall cease" was held to be final, and was considered as if it had been said—all suits shall cease for ever,—for the determining the suit determined the right of the thing, because the party has no other remedy but by suit<sup>2</sup>. And an award made upon a reference, "of all then existing disputes" was not considered the less final, because the arbitrator had extended it only to the two actions then pending, and had not taken equitable claims into his consideration<sup>3</sup>. But an award, that "each party shall be nonsuited in the action which he has brought against the other," is not final, and therefore not good; because a nonsuit does not bar them from bringing a fresh action<sup>4</sup>. That an award of a nonsuit is not final, has been uniformly held from the first law proceedings in England to the present day<sup>5</sup>.

<sup>2</sup> 6 Mod. 33.

<sup>3</sup> 2 Ld Raym. 961. 1 Salk. 74.

<sup>4</sup> 1 Moore, (C. P.) 4.

<sup>5</sup> Fbht. 51. a. 6. Brooke, 45. a.

<sup>6</sup> 6 Mod. 232. 1 Barnard, 463. et al.

If the award be of a thing to be done at a future day, it is final, if it must then be absolutely done; as, if it be to pay money at three

- Palm. 110. several days to come °; or to give a note or a bond for the payment of money at a future day °. But, if it depend on a condition whether it must be executed or not, then it is not final; as, if it be, that the money shall be refunded, if it appear afterwards that the party was not entitled to retain it. °.
- Palm. 110.

It was formerly considered that an award must be *mutual* to render it valid; that is,—that it ought not to give an advantage to one party without an equivalent to the other;—and much has been said in the old law books to enforce this rule;—but, after all, it may be resolved into the principle, that the thing awarded to be done should be a final discharge of all claims, by the party in whose favour the award is made, against the other for the cause submitted; and therefore, amounts to nothing more than a different form of expression of the case, which requires that an award shall be *final* °.

- Kyd, 219.

The *reservation*, or the *delegation* of the authority of the arbitrator, may also be considered as a branch of this rule. If, for instance, he reserve to himself the authority to alter the whole or any part of the award, such reservation is clearly void °; for the principal rule in the construction of awards is, that they shall be cer-

- 2 Rol. Rep.  
189. Palm. 110.  
146.

tain and definite; and, if the arbitrator reserves a power over any thing, the award is not final'. <sup>1</sup> Rol. Arb. H. 10. 12 Mod. 139.

As, if the arbitrators order that one of the parties shall give security to the other, for the payment of a sum of money, but *reserve* to themselves the power of considering the propriety of such security; or, if they *reserve* to themselves the power of explaining any doubt that may arise on the meaning of any part of the award". But an award, that one of the parties should pay to the other £105, on a certain day, and if he did not pay it then, that he should pay at a future day £110, was said to be good; because it is not a reservation of a future authority, but a penalty to enforce payment at the day, which is within the power of the arbitrators'. <sup>2</sup> Rol. Rep. 214. 215.

<sup>3</sup> Rol. Arb. H. 2.

As to the *delegation* of the power of the arbitrators, it appears clear that it is not within the implied intention of the submission, and it is therefore a branch of the *first* general rule for making the award, as well as of this; that it applies to this, is obvious, and scarcely needs an example to prove it.

But, if the arbitrators award the substance of the thing, and leave the *form* to be settled by another; this is not such a delegation of authority as to invalidate the award". Thus, <sup>4</sup> 6 Ves. 346.

where the arbitrators ordered mutual releases to be executed, and left it to a Master in Chancery to settle the form, this was not considered a delegation of authority \*. Nor is it such a delegation as to defeat the award, if the arbitrator direct that the parties shall abide by the award of a former arbitrator †. If, however, instead of deciding the matter himself, the arbitrator direct that the parties shall stand to the award of another, this direction of the arbitrator, and of course, the award of the person delegated by him, are bad.—Because the submission of the parties to an individual, arises from the confidence they repose in his integrity and skill, and is merely personal to him; the leaving the matter submitted to him to be decided by another, is therefore contrary to the scope of the re-

\* Dig. l. iv. t. 8. *ference* \*.

† 33. n. 16.

Rot. Arb. H. 11.

B. 20. Hard.

43. Jenk. 128.

Another branch of this rule is, that the award shall not be *of part only* of the things submitted. But this must be understood with a considerable degree of limitation; for if the thing awarded necessarily includes the other things mentioned in the submission,—as the award of one particular thing to be done for the ending of a hundred matters in difference, the award is good †. And, as of several things, so it is of several persons; for if two on one side

\* 1 Keb. 738.

† 1 Lev. 132.

and one on the other submit, the arbitrator may make an award between one of the two of the one part, and the other of the other part; and such an award will stand good <sup>b</sup>.

<sup>b</sup> Kyd, 182, &c.

After all that has been written on the subject of making the award final, the best mode appears to be, wherever it is practicable, to order, that after the execution of the other parts of the award, mutual releases shall be executed to the date of the submission.

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Having thus treated of the *principal general rules* to be observed in making the award, we proceed to those miscellaneous subjects which could not with propriety be brought under the foregoing heads.

We have seen, that an award must be made in conformity to the submission,—that it must not extend to any matters beyond those referred,—and that it will not be allowed to affect the rights of persons who are not parties to it;—this is the *first* rule. The *second* is,—that it must not direct things to be performed which are in their nature impossible. The *third*,—that it must be consonant to reason. The *fourth*,—that it must not be contrary to any known, well-

established law. The *fifth*,—that it must be certain; and the *sixth*,—that it must be final; and which includes the rules, that the arbitrator cannot reserve or delegate his authority; nor make an award of only part of the matters submitted. These are the principal rules for making, and the qualities necessary for constituting a good award; and, unless they are attended to in the formation of it, an award may in general, either in whole or in part, be set aside.

Besides these, there are many other causes for setting aside an award. The principal one, (but which has so seldom occurred in England that we cannot find an undisputed case, in point in the law authorities<sup>c</sup>.) is for *fraud* or *corruption*, of the arbitrator; there is no doubt however, that this would, (as it does every thing else,) vitiate an award. According to the law of Scotland, this is the *only* cause for setting aside an award; for by the Acts of *Sederunt* of 1695, the courts of judicature cannot entertain a motion for setting aside “a decree-arbitral upon any cause or reason whatsoever, unless that of corruption, bribery or falsehood to be alleged against the judges arbiters who pronounced the same.” By falsehood is here meant, forgery or vitiation of the submission, or of the award<sup>d</sup>. Lord Hardwicke was also of this opi-

<sup>c</sup> 2 Ld. Raym. 857. but see 1 Salk. 73.

<sup>d</sup> Erskine, B. iv. tit. 3. § 35.

nion, for he is reported to have said "that the only ground to impeach an award is, collusion, or gross misbehaviour in the arbitrators". And in fact, according to our *statute law*<sup>1</sup>, there is no other ground for setting aside an award, than that of the "misbehaviour" of the arbitrators, or that the award "was procured by corruption or other undue means."

*Misconduct*, or gross partiality, is in its strongest sense closely allied to fraud, but it may also be venial. To imputed misconduct the courts will certainly not listen; for this is the most frequent subject of complaint by the party who thinks himself aggrieved; an affidavit therefore, for a motion to set aside an award on this ground, must state the precise points which were submitted to the arbitrator, and show in what his misconduct consisted<sup>2</sup>: and, where an award was sought to be set aside, on the ground that the arbitrator had not noticed a certain clause in the agreement of reference, the court discharged the rule with costs, in consequence of the affidavit not showing, as it ought to have done, "that the clause in the agreement was distinctly pointed out to the arbitrator, and that he was expressly required to act upon it"<sup>3</sup>. Where however, the case is clearly made out,

<sup>1</sup> 3 Ark. 407.  
(530.)

<sup>2</sup> Stat. 9, 10.  
Will. III. c. 5.  
<sup>3</sup> 1.

<sup>1</sup> M.  
P.)<sup>4</sup>

<sup>2</sup> 2 B. & Ald  
704.

the award will be set aside. Under this head several cases appear, from which we shall quote the following:—Where the submission was to three arbitrators, or any two of them, and two by undue means excluded the third, the award of the two would be set aside<sup>i</sup>; and so, if the arbitrators hold private meetings with one of the parties, and admit him to be heard to induce an alteration in their award<sup>k</sup>; and also, where the arbitrators promised to hear witnesses, but made their award without hearing any<sup>l</sup>; and where they promised not to make their award until one of the parties should come from abroad, but they made it before<sup>m</sup>.

<sup>i</sup> 2 Vern. 515.  
& at sup. § v.

<sup>k</sup> 2 Vern. 26.

<sup>l</sup> Id. 251.

<sup>m</sup> Id. 26.

These and similar cases may be ranked under the head of misconduct, or at least gross partiality; and the following is nearly allied to them;—as, where the arbitrators had an interest in the subject of reference; this, a court of equity considered a sufficient ground for setting aside the award:—it related to a cargo, in which the arbitrators were interested, and five days after the award was delivered they attached the money awarded, for debts owing to them by the party in whose favour the award was made; the court set it aside; on the presumption that the arbitrators might have



put too great a value on the cargo, from the interest they had in the subject <sup>n</sup>. \* 2 Vern. 26.

There are cases, as it has been remarked, where the misconduct may be venial, but yet the award would not be allowed to stand:—as where the arbitrators had insisted on three guineas a-piece to be paid them by each of the parties, before making their award, for their trouble and expenses; the defendant refused to do it on his part, and the plaintiff paid the whole money. The court thought this a matter of so delicate a nature, and the example so dangerous, that they set aside the award on that ground,—because if it should be suffered, it would be hard to distinguish what was corruption <sup>o</sup>. \* 2 Barnet J, 463.

The tossing up a piece of money, for who should name the umpire, was also considered a sufficient instance of misconduct to cause the award to be set aside <sup>p</sup>. It was thought at one time, \* Vide sup. § v. that the circumstance of the arbitrator's employing the attorney of the party, in whose favour the award was made, to draw it up, was a proof of corruption; but there is no case in point; nor does it appear to be by any means a justifiable reason for setting aside, or even calling in question, an award <sup>q</sup>. \* Kyd, 349.

Besides the above causes by which an award

is rendered nugatory or invalid, the following may also be enumerated:—as, where the arbitrators have suffered the time to expire, and the parties will not consent to renew it; (1) this indeed may be more properly said to invalidate the submission. The arbitrators proceeding without giving notice to the parties to attend their meetings, will, it has been already noticed, make void the award; as will, two of the arbitrators joining in it without giving the third the regular opportunities of attending'. But

\* 2 Vera. 515. &  
see § v.

the following will not vitiate the award:—A stranger joining in it;—because it is not the less

\* 4 Taunt. 232.

the award of the arbitrators': The award having no date; because it takes effect and becomes binding only from the day of the delivery':

\* 6 Mod. 244.  
\* 1 Id. Ryms.  
1076. Salk. 76.  
498. 3 Bulstr.  
312.

The having no stamp, or an improper stamp; because the court will leave the party in whose favour it is made to procure the proper stamp

\* 7 Term Rep.  
95.

to it on paying the penalty': Nor will misconception or mistake of one of the arbitrators be considered sufficient to set aside an award.

(1) On submission by Bond, if the time expire before the award is made, and the parties by mutual consent agree to enlarge the time, the penalty for non-performance of the award cannot be recovered'; and it is said, the agreement must have a fresh stamp".

\* 3 Term Rep.  
592. n.  
\* Kyd, 311.

The award itself can only be impeached, either from objections appearing on the face of it,—as not being made in conformity to the rules above mentioned; or from extrinsic circumstances,—such as the misconduct of the arbitrators, or the concealment of one of the parties. It has been seen, that by the express words of the statute, awards can be set aside only from the “misbehaviour” of the arbitrators, or from its being “procured by corruption or undue means;” but a court of equity will set the award aside, from fraud or concealment of either of the *parties* \*. <sup>22 Eq. Ca. Abr. 80.</sup> It is said<sup>7</sup> however, that this clause in the <sup>Cald. 174.</sup> statute is not to be construed too strictly. Any other objections, which are plainly *dehors* the award, may be urged in the same manner as those founded upon corrupt conduct: such as, that the arbitrators or umpire have altered the award, after notice to the parties of its being executed and ready for delivery<sup>2</sup>; (1) and that<sup>6 East, 310.</sup>

(1) It is scarcely necessary to say, that after an award is once made and delivered, no subsequent alteration by the arbitrator can avail; for even before the delivery of the award, if it be in fact made, and notice given to the parties no change can be effected<sup>2</sup>. Lord Ellenborough<sup>6 East, 309.</sup> observed, that “the arbitrator’s authority having been once completely exercised, pursuant to the terms of the submission, was at an end, and could not be revived, even for the purpose of correcting a mistaken calculation of

they had not at the time of making the award, sufficient documents or information from which to draw a correct opinion<sup>b</sup>.

<sup>b</sup> 2 Term Rep.  
781.

It has been said before, that an arbitrator cannot be compelled to discover the reasons which influenced him in making his award; but if there be any palpable mistake, the party aggrieved must bring his bill in Equity against the other party, to have it rectified<sup>c</sup>. But if

<sup>c</sup> 3 Atk. 644.  
(609.)

the clause to protect the arbitrator, which has been before recommended<sup>d</sup>, be not in the bond or agreement of reference, a bill may be filed against him to set aside his award, when corruption or partiality are assumed; and if he cannot show himself to have been incorrupt and impar-

<sup>d</sup> See § iii.  
  
<sup>e</sup> 2 Atk. 396.  
(417.)

tial, the court will make him pay the costs<sup>e</sup>. The clause in question will therefore protect him against this inconvenience; and if notwithstanding this, he be made party to a bill, the court will on application order his name to be

<sup>f</sup> *Idem ib.*

struck out<sup>f</sup>. But in a reference by rule of *nisi prius*, application may be made to an arbitrator to state (of course if he think proper,) on what ground he gave the damages; or the award may

<sup>g</sup> 8 East, Rep. 3. figures 5." It is probable however, that a court of equity would interfere on such an occasion, if the submission were made a rule of such a court,

be sent back to the arbitrator for his reconsideration<sup>b</sup>.

<sup>b</sup> 5 Taunt. 460.

Much has been, (it would appear uselessly,) said on the subject of the arbitrator's giving notice of the award, and it was formerly contended that the parties would forfeit their bonds, by not taking notice of it themselves<sup>c</sup>; but as there<sup>c</sup> Kyd, 107. can at the present day be no doubt on the mind of any one, of the propriety of giving notice when the award is ready to be delivered, it is not necessary to trouble the reader on this subject.

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It is not the author's intention to treat of the course of proceedings to compel the performance of the award, nor of the means to be used when it is sought to set it aside: this would be invading the province of the lawyer, which is certainly not his wish; and particularly, as these topics have been so ably treated of by the legal writers<sup>d</sup>. The following however may not be<sup>d</sup> See Kyd & Cald. c. vi. vii. considered as improper even in a professedly<sup>viii.</sup> practical work.

It is not necessary that the arbitrator should point out the method in which his award is to be carried into execution; for, such a rule, it

has been observed, would overturn a great number of awards<sup>1</sup>.

As to the performance, it need not be literal, for if it be virtually done, it is all that is required<sup>m</sup>; and a performance by attorney, or authorised agent, is equivalent to a performance by the principal<sup>n</sup>; and if a party make every exertion in his power to fulfil the intentions of the arbitrator, and circumstances not under his controul prevent him, this is sufficient<sup>o</sup>, for the law will no more require an impossibility in the performance of an award, than permit it in the formation of the submission; but a man is bound to do every thing within his ability to give effect to his performance. If no time be limited by the award for its performance, a reasonable time is assumed<sup>p</sup>. If an award be void in part, the party must perform what is valid<sup>q</sup>. When the payment of money is directed, the party must pay it; he cannot set it off against a counter-demand<sup>r</sup>. In case of death, the executors must obey the directions of the award; and if the party die, in whose favour an award is made, the money must be paid to his representatives, even though no mention be made of them in the award<sup>s</sup>. If an award be lost, a copy must be produced, substantiated by affidavits, and the attachment will issue as on the

<sup>1</sup> 2 Atk. 501.

<sup>m</sup> 3 Bulstr. 62.

<sup>n</sup> 4 Leon. 110.

<sup>o</sup> See Jenk. 136.

<sup>p</sup> 13 East Rep. 22.

<sup>q</sup> Vis. Arb. Q. 11. Jenk. 136.

Salk. 69.

<sup>r</sup> 2 Lev. 6. Yelv.

92. 1 Brownl.

92. &c.

<sup>r</sup> Barnes, 56.

<sup>s</sup> 2 Vent. 249.

1 Leon. 316.

3 Idem, 212.

original'. Where an attempt is made to set Str. 526. aside an award on a submission under the statute, the motion must be made before the end of the next term after making the award, in the court where the submission is recorded; and it has been before remarked, that nothing is a ground, within the statute, for setting aside an award, but the *misconduct* of the arbitrators; the courts will not therefore grant a motion to set aside an award for an objection appearing on the face of it, though that will be a good reason for refusing an attachment to enforce it <sup>u</sup>.

= 5 Andr. 997.

7 Term Rep. 73.  
Kyd, 342.

It may be readily conceived, that the courts will not refuse to grant an attachment, or listen to a motion to set aside an award, on frivolous pretences, such, for instance,—as the alleged misconduct, or partiality, or erroneous judgment of the arbitrators. Lord Loughborough declared, that if the parties agreed to refer the whole matters in difference to judges of their own choice, *he* could not correct the error of their judgment'. If indeed, every one who objected = 2 Ves. jun. 22. to the award of an arbitrator were to be listened to, the courts would have little else to do; nothing being more general, than for one of the parties to be dissatisfied; yet, it has been well observed, if they were not sometimes to interfere and grant relief, arbitrators would have too

great a power and might abuse it from corrupt motives",

" 2 Ves. 315.  
2 Wils. 149.

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It has been the author's endeavour in the preceding pages, to place before the reader in as small a compass as the nature of the subject would admit of, a short treatise on the law, the principles, and the practice of arbitration,—which he hopes will be found useful to merchants and the members of Lloyd's, to whom he most respectfully submits it.



## Appendix

### I.

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PART 1. CHAP. 1. SECT. 1. ARTICLE 2.

[a] (*Page 33.*)

To show the absurdity of the principle, of making the damage done to a ship, by purposely running her ashore in a storm, a subject of general contribution,—the following case has been put:—Suppose a ship to have a valuable cargo on board which is greatly damaged by the act of running the ship ashore;—then, as this damage is, as well as the damage done to the ship, the consequence of endeavouring to preserve the whole, it is asked,—“will the owner of the ship contribute towards making it good?” The reply necessarily is,—“if the claim were a valid one there is no doubt that he must.” In such an event the claim could

• Ut sup. P. 1.  
c. 1. § 1. art. 1.  
b 3 Rob. Adm.  
Rep. p. 260.

be very easily adjusted :—the statement would indeed be similar to that mentioned in a preceding note <sup>a</sup>, of “an universal jactus <sup>b</sup>.” The claim would stand as follows :—

Let the ship-owner be *a*.

— the merchant *b*.

— a third person to adjust and settle the claim *c*.

Let the value of the *ship* on her arrival be.... £500.

— the value of the *freight* be..... £1000.

— the value of the *cargo*, on arrival, be.... £1000.

Let the neat amount of the repairs of the ship, in consequence of running her aground, be..... £2500.

— the amount of the damage done to the cargo..... £9000.

The loss is £9500.

Then the apportionment will be as follows :—

The ship, valued in her deteriorated state..... £500

Add the amount of damage to be made good by the general average..... 500

	1000	} pays £1583 : 6 : 8
The freight (after deducting the wages).....	1000	

Amount brought forward		£1583 : 6 : 8
The cargo, valued in its deteriorated state.... 1000		
Add amount of damage to be made good by general average..... 9000		
—10,000 pays		7916 : 13 : 4
Amount to contribute.....		<u>£12,000 pays</u>
		<u>£9500 : 0 : 0</u>
<i>c</i> would then receive of <i>a</i> .....		<u>£1583 : 6 : 8</u>
and of <i>b</i> .....		<u>7916 : 13 : 4</u>
		<u>£9500 : 0 : 0</u>
And <i>c</i> would pay to <i>a</i> .....		500
and to <i>b</i> .....		9000
		<u>£9500</u>

## Appendix

### II.

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PART 1. CHAP. 2. SECT. 3. ARTICLE 1.  
(Page 108.)

THE following calculations are intended to show that a Partial Loss on British manufactures may be adjusted, without having recourse to the erroneous method of apportionment, called "a Salvage Loss."

Let all the *data* be the same as in Part 1. ch. 2. sect. 3. viz :—

*Interest*,—£500;—being the amount of the invoice, covered with the premium of insurance, &c.

*Deterioration*,—one-half.

*Charges*,—£100;—being the amount of freight and duties.

<i>Loss</i> ,—on a losing market	}	£50 per cent. on the amount of interest.
<i>Profit</i> ,—on a gaining market		

#### (1) FIRST EXAMPLE.

##### *On a Saving Market.*

Certificate, that if the goods had arrived

(1) N.B. This and the following examples, will serve as a *key* to those adjustments in the Essay where these *data* are assumed.

*sound* they would have sold at an *advance* of 22½ per cent. on the cost.

Amount of invoice, with the premium, &c.....	£500
Deduct charges on invoice, and the pmo. (say) ..	50

Neat cost of goods.....	450
-------------------------	-----

Advance (per certificate) 22½ per cent.....	100
---	-----

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550

Add charges, &c. as above.....	50
--------------------------------	----

Gross produce of damaged goods if } they had arrived sound .....	(1) 600
---	---------

Gross produce of damaged goods.....	(A) 300
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Difference between the <i>pro-forma</i> sales of the sound goods, and the sales of the damaged goods—one-half, (or 50 per cent. on the invoice, i. e. £250.).....	(B) 300
---	---------

*Proof.*

To amount of invoice, premium, &c.....	500
--	-----

To .. do. .... freight, duties, &c. ....	100
--	-----

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Dr. 600

By received gross produce of sale (A).....	£300
--	------

By... do. ... of the underwriters .. (B)....	250
--	-----

By loss of half the freight, duties, &c. by de- preciation in value.....	50
---	----

---

Cr. £600

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(1) Amount of invoice, covered with premium, &c.....	£500
--	------

Add freight, duties, &c.....	100
------------------------------	-----

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A Saving Market £600

## SECOND EXAMPLE.

*On a Losing Market.*

Certificate, that if the goods had arrived *sound* (the markets being overstocked,) they would have sold at a *depreciation* of  $33\frac{1}{3}$  per cent. on the cost.

Amount of invoice, premium, &c.....	£500
Deduct charges on invoice, and the pmo... (say)....	50
	<hr/>
Net cost of goods	450
Depreciation (per certificate) $33\frac{1}{3}$ per cent.....	150
	<hr/>
	300
Add charges, &c. as above.....	50
	<hr/>
Gross produce if arrived sound..... (1)	350
Gross produce of damaged goods..... (A)	175
	<hr/>
Difference, (or 50 per cent. on the invoice, &c. }	£175
i. e. £250)..... (B).....	<hr/>

*Proof.*

To amount of invoice, premium, &c.....	500
To....do... freight, duties, &c.....	100
	<hr/>
Over. Dr.	£600
	<hr/>

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(1) Amount of invoice, covered with premium, &c.....	£500
Add freight, duties, &c.....	100
	<hr/>
	600
Loss, 50 per cent. on the invoice, &c.....	250
	<hr/>
A Losing Market of 50 per cent.....	£350
	<hr/>

By received gross produce of sale..... (A).....	£175
By.. do.. of the underwriters..... (B).....	250
By loss of half the freight, duties, &c.....	50
By balance, which is loss of markets on the one-half of the value arrived.....	125
	<u>          </u>
	Cr. £600
	<u>          </u>

## THIRD EXAMPLE.

*On a Gaining Market.*

*Case 1.* On the preceding *datum* of 50 per cent. profit.

Certificate, that if the goods had arrived sound they would have sold at an *advance* of  $77\frac{1}{2}$  per cent. on the cost.

Amount of invoice, and the pmo.....	£500
Deduct charges, &c.....	50
	<u>          </u>
Net cost of goods.....	450
Advance (per certificate) $77\frac{1}{2}$ per cent.....	350
	<u>          </u>
	800
Add charges, &c... ..	50
	<u>          </u>
Gross produce if arrived sound..... (1)	850
Gross produce of damaged goods..... (A)	425
	<u>          </u>
Difference, (or 50 per cent. i. e. £250)..... (B)	£425
	<u>          </u>

---

(1) Amount of invoice, covered with premium, &c.....	£500
Add freight, duties, &c.....	100
Profit, 50 per cent. on the invoice.....	250
	<u>          </u>
A Gaining Market of 50 per cent.....	£350
x 2	<u>          </u>

*Proof.*

To amount of invoice, premium, &c.....	£500
To...do....freight, duties, &c.....	100
To balance, which is the profit on the one-half value arrived.....	125

Dr. £725

By received gross produce of sale.... (A)....	£425
By received of the underwriters.... (B)....	250
1½% loss of half the freight and duties.....	50

Cr. £725

*N.B. Let the foregoing three Examples be compared with Example 1. (Page 102.)*

*Case 2. On a Gaining Market.*

Let the profit be increased to 120 per cent.

Certificate, that if the goods had arrived sound they would have sold at an *advance* of 155½ per cent. on the cost.

Net cost of goods, as before.....	£450
Advance (per certificate) 155½ per cent.....	700

1150

Add the charges on invoice.....	50
---------------------------------	----

(1) 1200

Gross produce of damaged goods..... (A)	600
---	-----

Difference, (or 50 per cent. on invo. i. e. £250) (B)	£600
---	------

(1) Amount of invoice, premium, &c.....	£500
Add freight, duties, &c.....	100
Profit 120 per cent. on the invoice.....	600

A Gaining Market of 120 per cent. £1200



*Proof.*

To amount of invoice, premium, &c.....	£500
To . . do . . . freight, duties, &c . . . . .	100
To balance, which is the profit on the one-half value arrived . . . . .	300

Dr. £900

By received gross produce of sale . . . (A) . . .	£600
By recived of the underwriters . . . (B) . . .	250
By loss of half the freight and duties . . . . .	50

Cr. £900

## Appendix

### III.

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#### PART II. ARTICLE I.

(Page 159.)

As the heads of the bill intended to have been brought into parliament on the subject of insurance are not generally known, an abstract may be gratifying to the curiosity of the reader.

The resolutions of the Committee appointed to prepare the bill, appear at length in the Journals of the House of Commons, vol. xxv. p. 597.

*“ Jovis, 24<sup>o</sup> Die Martii, 1747.”*

The *first* resolution of the Committee is to the following purport:—That in all insurances upon *goods* or *freight*, when the interest of the assured is by the policy valued at a sum certain, or is valued at the sum insured, or no particular

value is set thereon; the assured shall in case of loss or damage, total or partial, recover only according to the true and real value of the goods insured at the place where the same were shipped; or the neat *freight* which would be due if the ship had arrived safe, together with the premium of insurance. It was not intended however that this should extend to prevent the fixing of a particular value in the policy upon the weight, measure, or tale; or upon each cask, bale, or package; provided that each sort of goods so valued be specified;—and in case of loss or damage, total or partial, the assured shall recover according to the value fixed in the policy, for the goods he has lost or which have been damaged.

The *second* resolution relates to the valuation of *ships*;—on which the assured is to recover the real value, with the premium of insurance, in case of loss.

The *third* resolution states how seamen's wages shall be recovered in case of loss. *At that time wages were an insurable interest.*

By the *fourth* resolution, in case of *barratry*, the assured shall not recover, unless it appear that the master or mariners *ran away* with the ship or goods.

The *fifth* resolution regulates the manner of insuring and recovering as to the *account* of the person insured.

The *sixth* is in substance as follows:—All representations or warranties of any fact or circumstances relative to the voyage or the interest insured, which may materially affect the terms of the insurance, shall be inserted in the policy before it is signed. But this is not to prevent any proof at a future time of misrepresentation or concealment. All insurances which have no such information, &c. inserted in the policy, shall be deemed as if no representation or warranty had ever been given or made.

The *seventh* resolution provides for a return of premium in case of short interest or over insurance,—and it states,—that in all cases where the insurance shall be adjudged void by reason of fraud or deceit, no return shall be made.

The *eighth* resolution is on the subject of actions in courts of law.

The *ninth* is left incomplete—it states:—that “all insurances on interest or no interest, or without benefit of salvage, shall be—

The *tenth* provides that no abandonment shall be allowed in case of damage or partial loss. (1)

(1) It should be noticed, that the heads of this bill were brought forward in the Committee a very short time (about two years) before the memorandum of warranty appeared at the foot of the policies,—and I imagine *vide supra*, about the time that a *revision* of the policy was under Part iv. consideration.

## Appendix

### IV.

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THE following is the substance of a Letter addressed by the author to ROBERT SHEDDEN, Esq. of Lloyd's, between the publication of the third edition of this Essay and the present.

In all the calculations which have been made to elucidate the two principal modes of adjustment, viz:—on the Neat Proceeds and the Gross Proceeds, it has been assumed that the *full amount* of freight, duty and charges, is in the one case included in, and in the other deducted from, the gross amount of the sales. And this was the principle on which the court of King's Bench came to its decision in the celebrated cause of Johnson v. Shedden. *But this principle is not adopted in practice.*

For instance:—A merchant receives a parcel

of goods which are sea-damaged, and on which he has paid the full amount of duty;—the revenue professes to return so much of the duty as is proportionate to the damage sustained by the goods: if the merchant feels assured that he shall obtain such a return of duty, he will be enabled to sell his goods for so much less as that shall amount to; and no one would think of analysing the account of sales to find how much duty is contained in it; nor indeed, if the duty returned were *ad valorem*, or in proportion to the damage, would it be of any use that he should. Because equal proportions being taken from unequal sums leave the relative difference the same.

The objection to a settlement on the Net Proceeds, is that when the full amount of the freight, duty and charges is deducted from the damaged sales, the underwriter is made to pay a proportion of the loss on these items, and is also by this mode of calculation involved in “the fluctuation of the markets.” As far as relates to the duty, which is generally the principal charge, this objection appears now to be obviated; as there is much less difficulty in getting a return of duty from the revenue than there formerly was.

The above remarks are necessary as preliminary to an inquiry,—whether the principle of selling goods IN BOND, or (which will be in effect the same) the purchaser paying the duty, is a proper mode of adjustment as regards the relative situation between the merchant and the underwriter?

If the sales of damaged goods were always supposed to include, or actually did include, the full duty, it is certain that an adjustment on this principle would not be the same as that of the gross proceeds; but let it be assumed that the merchant receives back from the revenue the duty in proportion to the damage done to the goods, and it will be found that (as far as relates to the duty) it is of no consequence whether the adjustment be made upon the basis of the *gross proceeds*, the *net proceeds*, or the *goods sold in bond*. And thus it will be shown that the merchant gets his full indemnity, and the underwriter pays no more than he has been, at least for some time past, in the habit of paying, notwithstanding the legal decisions on the subject.



In the following calculations let these *data* be assumed ;—

INTEREST £500;—being the amount of the Invoice covered with the premium, and including the freight, supposed to be paid on shipping.

DETERIORATION,—one half.

DUTY £100;—the revenue returning one-half (*i. e.* in proportion to the damage.)

LOSS,—on a losing market } 50 per cent. on the  
PROFIT,—on a gaining market } amount of interest.

#### FIRST EXAMPLE.

Adjustment on the principle of the  
NEAT PROCEEDS.

##### 1. *On a Saving Market.*

If the goods had arrived <i>sound</i> , they would		
have produced .....	£600	
<i>(i. e.</i> amount of invoice £500, and duty £100.)		
Deduct duty.....	100	
	<hr/>	500
Being <i>damaged</i> , they did produce.....		
	£300	
<i>(i. e.</i> half the amount of invoice £250, and half the duty £50.)		
Deduct duty.....	50	250
	<hr/>	<hr/>
Depreciated in value 50 per cent.	£250	
	<hr/>	<hr/>

*Proof.*

The merchant pays for his goods .....	£500	
And for duty .....	100	
	<u>        </u>	£600
He receives, viz.		<u>        </u>
From the revenue .....	£50	
From the underwriter .....	250	
Gross sales (including one-half the duty)	300	£600
	<u>        </u>	<u>        </u>

**2. On a Losing Market.**

If <i>sound</i> , the goods would have produced..	£350	
i. e. goods £500, (less £250, loss of mar-		
kets) and duty £100.		
Deduct duty .....	100	
	<u>        </u>	250
Being <i>damaged</i> , they did produce .....	£175	
(i. e. goods £125, and duty £50.)		
Deduct duty .....	50	125
	<u>        </u>	<u>        </u>
		£125
		<u>        </u>

Deteriorated 50 per cent.

*Proof.*

The merchant pays for his goods (as above) ....	£600	
He receives, viz.		<u>        </u>
From the revenue .....	£50	
From the underwriter .....	250	
Gross sales (including one-half duty)	175	
	<u>        </u>	£475
Loss of market on the one-half of the in-		
terest supposed to have arrived sound..	125	
	<u>        </u>	£600
		<u>        </u>

3. *On a Gaining Market.*

If *sound*, the goods would have produced..... £850  
 (i. e. goods £500, with £250 profit, and  
 £100 duty.)

Deduct duty..... 100

£750

Being *damaged*, they did produce..... £425

(i. e. goods £250, profit £125, duty £50.)

Deduct duty..... 50 375

£375

Deteriorated 50 per cent.

*Proof.*

The merchant pays for his goods (as above)..... £600

He receives, viz.

From the revenue..... £50

From the underwriter..... 250

Gross sale (including one-half duty, and  
 one-half profit of market)..... 425

£725

Profit of market on one-half of the inter-  
 est, supposed to have arrived sound.. 125

£600

## SECOND EXAMPLE.

Adjustment on the principle of goods being sold  
IN BOND.

1. *On a Saving Market.*

If <i>sound</i> , the goods would have produced.....	£500
Being <i>damaged</i> , they did produce.....	250
	<u>£250</u>
Deteriorated 50 per cent.	<u>      </u>

*Proof, viz.*

The merchant pays for his goods.....	£500
He receives, viz.	<u>      </u>
From the underwriter.....	£250
Amount of sale.....	250
	<u>£500</u>

2. *On a Losing Market.*

If <i>sound</i> , the goods would have produced.....	£250
Being <i>damaged</i> , they did produce.....	125
	<u>£125</u>
Deteriorated 50 per cent.	<u>      </u>

*Proof.*

The merchant pays for his goods.....	£500
He receives, viz.	<u>      </u>
From the underwriter.....	£250
Amount of sale.....	125
	<u>£375</u>
Loss of market on the one-half of the interest, supposed to have arrived sound....	125
	<u>£500</u>

3. *On a Gaining Market.*

If <i>sound</i> , the goods would have produced.....	£750
Being <i>damaged</i> , they did produce.....	375
	<hr/>
	£375
	<hr/>
Deteriorated 50 per cent.	

*Proof.*

The merchant pays for his goods.....	£500
He receives, viz.	<hr/>
From the underwriter.....	£250
Amount of sale.....	375
	<hr/>
	£625
Profit of market on one-half of the interest,	
supposed to have arrived sound.....	125
	<hr/>
	£500
	<hr/>

## THIRD EXAMPLE.

Adjustment on the principle of the  
GROSS PROCEEDS.1. *On a Saving Market.*

If the goods had arrived <i>sound</i> , they would have produced.....	£600
(i. e. amount of invoice £500, duty £100.)	
Being <i>damaged</i> , they did produce.....	300
(i. e. half the amount of invoice, and half the duty.)	
	<hr/> £300
Deteriorated 50 per cent.	<hr/> <hr/>

*Proof.*

The merchant pays for his goods.....	£500
And for duty.....	100
	<hr/> £600
He receives, viz.	<hr/> <hr/>
From the revenue.....	£50
From the underwriter.....	250
Gross amount of sale (including one-half duty).....	300
	<hr/> £600
	<hr/> <hr/>

2. *On a Losing Market.*

If *sound*, the goods would have produced..... £350  
*i. e.* goods £500, (less loss of market £250,) and  
 duty £100.

Being *damaged*, they did produce..... 175

£175

Deteriorated 50 per cent.

*Proof.*

The merchant pays for his goods (as above).... £600

He receives, viz.

From the revenue ..... £50

From the underwriter..... 250

Gross amount of sale (including one-  
 half duty)..... 175

£475

Loss of market on one-half of the interest,  
 supposed to have arrived sound.....

125  
£600

3. *On a Gaining Market.*

If <i>sound</i> , the goods would have produced. . . . .	£850
(i. e. goods £500, profit £250, duty £100.)	
Being <i>damaged</i> , they did produce. . . . .	425
(i. e. goods £250, profit £125, duty £50.)	<u>      </u>
	£425
Deteriorated 50 per cent.	<u>      </u>

*Proof.*

The merchant pays for his goods (as above). . . .	£600
He receives, viz.	<u>      </u>
From the revenue . . . . .	£50
From the underwriter. . . . .	250
Gross amount of sale (including one-half duty and one-half profit). . . . .	425
	<u>      </u>
	£725
Profit of the market on the one-half of the interest, supposed to have arrived sound	125
	<u>      </u> £800

Thus it is found to be of no consequence to the merchant or the underwriter, which of the above three modes of adjustment is adopted; for the former is indemnified, and the other pays no more than he ought to pay on either of them.

If the foregoing principle of adjustment be admitted as correct, it will be of consequence to inquire whether the price in Bond can be considered as "the market price" in contemplation of the court of King's Bench when its judg-



ments were delivered in the two before-mentioned causes? If the court considered that the damaged goods must necessarily contain the full amount of freight, duty and charges, then the adjustment on the principle of the goods sold in Bond is erroneous. The learned judge however, who delivered the opinion of the court in the cause of *Johnson v. Shedden*, said at the conclusion, "The difference of the net produce cannot be the rule to calculate by, *when the charges are not proportioned to the respective values of the sound and damaged commodities*;" are we thence to infer, that when they are so proportioned this principle will hold good?

It is evident from the above calculations, that though the merchant gets his indemnity in regard to the duties, it is not at the expense of the underwriter; he only pays what he is bound to pay,—that is, the actual damage done to the goods; and it is clear, that even if he should be injured by such a settlement, it is not an innovation; for it has been invariably adopted in practice before and since the decisions of the court.

## Appendix

### V.

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As it may be gratifying to curiosity, and perhaps useful to the judicious inquirer, to know the sources from which our maritime and insurance customs and laws are derived, I subjoin a list of the foreign laws, and of the foreign and English writers on these subjects.

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#### I. MARITIME LAWS.

Under this head I have inserted only those collections of Sea Laws, or Usages, which are looked up to as authority, and which have at one time or another been adopted in different parts of Europe.

## THE LAWS OF RHODES ON JETTISON.

It is considered that these laws, (or as they are said to be, "customs or usages of the sea",) were promulgated about *nine*<sup>a</sup> *hundred* years before the birth of Christ, in the time of Jehosaphat king of Judah, by the Rhodians, then a great maritime power<sup>b</sup>. They were adopted by Justinian into his Digest, and form Title 2. of the xivth Book. (1)

<sup>a</sup> Vide Boucher, Editor of 'Le Consulat.' 25.

<sup>b</sup> Selden, de Dom. mar. lib. i. c. 10. § 5.

## THE AMALFITAN CODE.

This code, called the "TABULA AMALFITANA," is said to have been compiled to-

(1) The Digest of Justinian, called "the PANDECTS." "Pisa, though long posterior to Bologna, was the second school of law in Italy. Some ascribe this early eminence to her possession of the Pandects; but this celebrated MS. was so hoarded both here and at Florence, that instead of restoring the Roman law it remained useless and lost to study, till Politian was allowed by Lorenzo, (the Magnificent,) to collate it with the Pandects first published at Venice. Politian's collated copy of that edition escaped the sack of the Medici library in 1494, and after a long train of travels and adventures it at last re-appeared at Florence in 1734." See FORSYTH'S *Remarks on the Antiquities, Arts, and Letters in Italy*, p. 18.

\* Schomberg on  
the Laws of  
Rhodes.  
Vide Park, pref.  
iv.

wards the end of the *eleventh* century, by the people of Amalfi<sup>c</sup>, an ancient commercial city in Italy, on the west coast of the gulf of Salerno.

ABRAHAM WESTERVEEN, in his address to the reader in *ROCCUS de Navibus, &c.* (Ed. 1708) enumerates the various maritime laws and the writers on public and private law, but he does not notice this code; nor have I found that Roccus himself quotes it, though his "NOTABILIA" contains quotations from very many preceding laws and treatises; and though he himself practised as a civilian at *Naples*. EMERIGON also, who in his preface gives a short history of maritime law, is silent on this subject, as are other authors. The *Consolato del Mare* seems generally to have been considered as ranking next in importance to the laws of Rhodes,—though Emerigon mentions the laws of Marseilles as next in point of time to them<sup>d</sup>. However this may be, it would seem that the whole civilised world is greatly indebted to the people of Amalfi on two accounts:—it is said that a native of Amalfi, (Flavio de Gioia) in the year 1302 discovered the Mariners' Compass<sup>e</sup>; (or, what is more probable, was the means of introducing the use of it into Eu-

<sup>d</sup> Vide Emerigon, pref. v. who cites Mornac, sur la loi ix. ff. ad Leg. Rhod. de jactu, & Gibalini, lib. 4. c. ii. art. 2. n. 2.

\* 1 Anderson on Commerce, (4th ed.) p. 265.

rope;) and that after the Roman law had remained in oblivion six centuries, a copy of the Pandects was found in that place<sup>f</sup>. (1)<sup>f</sup> Anderson, p. 147. Blackstone says, that a copy of the Digests was found at Amalfi, about the year 1130<sup>g</sup>. <sup>g</sup> 1 Black. Com. (8vo ed.) p. 81.

IL CONSOLATO DEL MARE<sup>h</sup>.

<sup>h</sup> Vide sup. note  
P. 1. c. 1. § 1.  
art.

## THE LAWS OF OLERON.

These laws, called "*les Jugemens, ou Rôles d'Oleron*," were compiled in the island of that name,—(in the bay of Aquitaine) by Richard I. who promulgated them in his quality of king of England<sup>i</sup>. But CLEIRAC<sup>j</sup> Selden *de Dom. mar. lib. ii. c. 24.* gives the credit of them to the Duchess of iv Blackst. Com. Guienne, the mother of Richard<sup>k</sup>. The c. 33. p. 423. (8vo edit.) French are anxious that it should be thought<sup>k</sup> Cleirac *Les us et coutumes de la mer*, p. 2. these laws originated with them. This however would seem to be of little consequence if they be, as it is asserted they are,

(1) Tradition says that this famous code was discovered in a barrel at Amalfi—and Hume, who believes the story, ascribes to this discovery the revival of the Roman law. But it is far more probable that the Pisans brought it from Constantinople while their commerce flourished in the Levant, and it is certain that before they took Amalfi Irnerius had been teaching the Pandects at Bologna<sup>l</sup>. <sup>l</sup> Forsyth's *Rem.* 51.

nothing more than a collection of decisions founded on the *Consolato del Mare*, and accommodated to the place and time <sup>m</sup>. (1)

<sup>m</sup> Vide Boucher, 133.

GODOLPHIN, in his "View of the Admiralty Jurisdiction," (London, 1685) has printed these laws under forty-seven heads or chapters. Some say they were promulgated about the end of the *twelfth* century (1194;) but Camden thinks it was many years later (1266) before they were generally known <sup>n</sup>.

<sup>n</sup> 1 Anderson, 179; & Vide Boucher, 133.

These laws are said to have been first printed in England in a little book called "the Rutter of the Sea," translated by William Copland, (12mo. no date.)

#### THE LAWS OF WISBUY.

The town of Wisbuy, which gives the name to these laws, was situated on the island of Gothland. The time when this code was compiled is disputed; it is supposed however to have been about the *thirteenth* century; though the northern writers pretend that

(1) Magens seems to think that the *Consolato del Mare* itself was merely a treatise on the sea laws of Olcron—and

• 1 Magens, 1. that Casa Regis wrote the *Consolato del Mare* <sup>o</sup>.

they are more ancient than the laws of Oleron, and even than the *Consolato del Mare* itself'. M. Boucher however says<sup>q</sup>, that "these laws are merely modifications of the judgments of Oleron," which (as mentioned above) he continues, "are only a collection of decisions founded on the '*Consulat*.'"

<sup>r</sup> Emer. pref. xi. who cites Kuricke sur la rubrique du droit Hanseatic, 681. Lubeck des Avaries, 105.  
<sup>q</sup> Boucher, 25, &c.

## II. THE LAWS OR ORDINANCES OF FOREIGN STATES.

BARCELONA.—A. D. 1484.—This is the date according to Emerigon<sup>r</sup>; but Marshall fixes it about the year 1435<sup>s</sup>. This ordinance is perhaps the first that mentions the subject of Insurance, notwithstanding what Emerigon says in his remarks on the ordinance of Wisbuy<sup>t</sup>.

<sup>r</sup> Emer. pref. xii.  
<sup>s</sup> Marshall, 20.  
<sup>t</sup> Benecké System, &c. 10.

<sup>u</sup> Emer. ut sup.

FLORENCE.—1523. (1)

(1) A scientific traveller (before quoted,) to whom the literary world is greatly indebted for "*Remarks during an Excursion in Italy*,"—says of Florence,—“you discover here on the surface of things how greatly commerce has

BRUSSELS.—1551. The Ordinances or Regulations (*Règlemens*) of this date are called by Emerigon<sup>a</sup> “*Loix Carolines*,” from their being promulgated by Charles V.

<sup>a</sup> Emer. xlii.

*Idem*.—1563. 1565. (Promulgated by Philip II.) These ordinances are, with a few additions, the same as the preceding.

ANTWERP.—1593. This ordinance is mentioned by Cleirac as an ordinance of Philip II. “*pour les Assurances de la Bourse d’Anvers*.”—I am inclined, with Magens, to think the date should be 1563, and that it is the same ordinance as that mentioned above. It was on these ordinances that Adrian Verwer wrote his annotations.

THE HANSE TOWNS.—1597. Made by a general assembly of deputies from the Hanse Towns and the free and maritime towns of the Empire, which met at Lubeck for that purpose. A French translation is in the collection made by Cleirac<sup>v</sup>. This is the ordi-

<sup>v</sup> Emer. ut sup.

degenerated in a country which gave it birth, language, and laws. The counting-houses are in general dirty, dark, mean vaults,—the ledgers stitched rather than bound, and

<sup>w</sup> Forsyth’s *Rem.* covered with packing paper<sup>w</sup>.

81.



nance referred to by Mr. Justice Abbott, in his most useful treatise, as "*the Hanseatic Ordinance*." Benecké, a writer on Insurance, (at *Hamburgh*,) quotes the Ordinance of Lubeck, *Hamburgh*, and Bremen, of 1591. But it is probable that he means this.

*Idem.*—1614. In this year, the consuls and deputies of the same towns met again at Lubeck, and made some regulations in explanation of the preceding. This ordinance was translated into German and Latin by Kuricke accompanied by an excellent commentary.

<sup>v</sup> Emer, ut sup.

AMSTERDAM.—1598. 1673. 1744. 1756.  
1776.

MIDDLEBURGH.—1600. 1685. 1719. 1726.

HAMBURGH.—1603<sup>a</sup>. 1731.

<sup>a</sup> Benecké, ut sup.

GENOA.—1610.

VENICE.—1626<sup>a</sup>.

<sup>a</sup> Westerveen, in *Roccus de Nau.*

ROTTERDAM.—1635. 1721. 1726.

LUBECK.—1657.

FRANCE.—“ *L'Ordonnance de Louis XIV. touchant la Marine, donné à Fontainebleau du mois d'Août, 1681.*”

This celebrated ordinance is said by a learned writer, whose judgment and experience in these matters cannot be called in question, to be “the best and most complete system of *positive law* for the regulation of insurance that has yet appeared in any country.” It is observed, however, “that many of the regulations contained in it were dictated by national interest and are contrary to the general law upon the subject <sup>b</sup>.”

<sup>b</sup> Marshall, prel. disc. p. 21.

COPENHAGEN.—1683. 1746.

<sup>c</sup> Westerveen ut sup.

DANTZIC.—1696 <sup>c</sup>.

KONIGSBURG.—1730. 1766.

BILBOA.—1737.

STOCKHOLM.—1750.

## III. FOREIGN TREATISES, &amp;c.

## LE GUIDON DE LA MER.

This work is inserted by Cleirac in the second part of his compilation, intituled "*Les Us et Coûtumes de la Mer.*" It was composed for the use of the merchants of "the noble city of Rouen"<sup>d</sup>. The date is <sup>Emer. pref. xiii.</sup> not known, but it is supposed to have been written about the latter end of the fourteenth century. It is the earliest *treatise* extant on the subject of marine insurance.

QUINTIN VAN WEYTSSEN. *Traité des Avaries.* 1563.

STRACCHA, *De Mercaturâ.*

———, *De Navibus.*

———, *De Assecurationibus.*

} *Lugduni,*  
1621.

LOCCENIUS, *De Jure Maritimo et Navali.*  
*Holmiæ, 1650.*

ZOUCHET, *Elementa Jurisprudentiæ, &c. et Maritimi.*  
*Lugdun. Batar. 1652.*

STYPMANNUS, *De Jure Maritimo et Nautico.*  
*Gryphiswald, 1652.*

SCACCIA, *De Cambiis.*

SANTERNA, De Assecurationibus.

ROCCUS, De Navibus et Naulo. *Idem* de Assecurationibus. Edit. I. (*circa*) 1660.

CLEIRAC, Les Us et Coûtumes de la Mer.  
*Rouen*, 1671.

HERTIUS, Paræmiæ Juris Germanici, Lib. 1.  
c. 48.

GROTIUS, De Jure Belli ac Pacis, &c. 1682.

(N. B. One of the best English editions of this celebrated author is in folio, 1738—which includes all the large notes of Barbeyrac.) (1)

TARGA, Ponderazioni sopra la Contrattazione  
Marittima. *Genova*, 1692.

RICARD. Le Negoce d'Amsterdam.

LANGENBECK. Annotations or Observations  
(*Anmerkungen*) on the Hamburg Ordinance.

ADRIAN VERWER. *Idem*,—on the Sea Laws  
of Philip II. (2)

CASAREGIS, Discours des Loix et du Commerce.

KURICKE, Diatribe de Assecuratione, &c.

(1) Barbeyrac was an eminent Law Professor at Groningen.

(2) This is called by some writers “A Treatise on the Marine Laws of the Low Countries.”

BYNKERSHOEK, Cornelius Von. Ad L.  
 ΑΞΙΩΣΙΣ IX. D. de Lege Rhodia de Jactu;  
 —& Quæstionum Juris Privati\*, in Opera <sup>\*Vide supra, 11, n.</sup>  
 omnia—tom. ii. *Lugd. Bat.* 1767.

DOMAT, Les Loix Civiles, dans leur ordre naturel, &c.

Translated by W. Strahan, LL.D. 1737.

BORNIER. Conférences des Ordonnances de Louis XIV., &c. *Paris*, 1729.

Scriptores de Jure Nautico et Maritimo; (*Stypmannus, Kuricke, et Loccenius*), cum præfatione HEINECCII. *Hal. Magd.* 1740.

VALIN, Nouveau Commentaire sur l'Ordonnance de la Marine du mois d'Août, 1681'. <sup>\*Vide sup. p. 11, & 252.</sup>  
*La Rochelle*, 1760.

BURLAMAQUI, Principes du Droit Naturel et Politique. *Geneva*, 1764.

POTHIER, (1) Traité du Contrat de Louage. Traité des Contrats d'Assurance. *Oeuvres de Pothier.* à *Paris*, 1781.

(1) The learned and accomplished Sir William Jones, whom Dr. Johnson designates as "the most enlightened of the sons of men,"—says of this excellent writer, (*M. Pothier*), in his Essay on the Law of Bailments,—"At the time when this author (*Le Brun*) wrote, the learned M. POTHIER was composing some of his admirable treatises on all the different species of express or implied contracts;—and here I seize with pleasure an opportunity of

<sup>\* Sir W. Jones' Works, vol. vi. 615. 4to.</sup>

EMERIGON, *Traité des Assurances et des Contrats à la Grosse.* à *Marseille*, 1783.

BENECKE (*Systema des Versicherungen*,) &c.  
Or, a System of Insurance and Bottomry,—  
according to the Laws and Usages of Ham-  
burgh, and the principal Mercantile Nations  
in Europe. *Hamburgh*, 1805.

BOUCHER. P. B. *Consulat de la Mer, ou Pandectes du Droit Commercial et Maritime.*  
à *Paris*, 1808.

recommending those treatises to the *English* lawyer, exhorting him to read them again and again; for if his great master, LITTLETON, has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style in which nothing is redundant, nothing deficient, he will surely be delighted with works in which all those advantages are combined, and the greatest portion of which is law at *Westminster* as well as at *Orleans*: for my own part I am so charmed with them, that, if my undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt, which every man, according to Lord COKE, owes to his profession.”—*M. Pothier* died in 1772. To the mercantile reader perhaps an apology may be necessary for giving this extract:—to lawyers, if any should condescend to peruse this Essay, no apology will be necessary.

## IV. ENGLISH TREATISES, &amp;c.

WELLWOOD, an Abridgment of all Sea Laws,  
&c. 4to. 1613.

MALYNE, Consuetudo vel Lex Mercatoria, &c.  
folio, 1622.

This book contains the laws of Oleron, Wisbuy,  
and the Hanse-towns.

SELDEN, Mare Clausum, seu de Dominio Maris,  
folio, 1635.

The best translation of this book is by "J. H."  
1663<sup>b</sup>.

MOLLOY, De Jure Maritimo et Navali. 1676. <sup>b</sup> Vide Butler's  
*Hore Juridice*,  
p. 127.

This work has gone through a great number of  
editions;—though Sir William Scott has observed,  
that Molloy "is of himself of little authority<sup>1</sup>." His  
references, however, are very numerous, and those  
to books of great esteem among civilians and lawyers.

MAGENS, Essay on Insurance, &c. 4to. 1755.

BEAWES, Lex Mercatoria rediviva. fol. 1758.

KAIMES, Principles of Equity. fol. 1767.

PARKER, Laws of Shipping and Insurances.  
4to. 1775.

WESKETT, A complete Digest of the Theory,  
Law, and Practice of Insurance, &c. fol. 1781.

- SCOMBERG, Treatise of the Maritime Law of Rhodes, &c. 8vo. 1786.
- MILLAR, Elements of the Law relating to Insurances, &c. 8vo. 1787.
- PARK, (now Mr. Justice PARK) System of the Law of Marine Insurances, &c. 8vo. 1787.
- BURN, Practical Treatise or Compendium of the Law of Marine Insurances. 12mo. 1801.
- MARSHALL, Treatise on the Law of Insurance. 8vo. 1802.
- ABBOTT, (now Lord Chief Justice ABBOTT,) Treatise of the Law relative to Merchant Ships and Seamen. 8vo. 1802.
- EVANS, Essays on the Law of Insurance, &c. 8vo. 1802.
- STRICKLAND, Essay on Particular Average. No date, (about 1802.) 8vo.
- ANNESLEY, Compendium of the Law of Marine Insurances. 8vo. 1808.



## Addenda,

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SEAMEN'S WAGES are said in the note page 79, of the Essay, not to be due, and therefore not recoverable by law, unless the contract entered into by them with the master, or the owners, be fulfilled; which contract is to this effect:—"That they shall not demand, or be entitled to their wages, or any part thereof, until the arrival of the ship at her final port of discharge, and her cargo be delivered."

It ought to be generally known to every one concerned in shipping, that the Court of Admiralty does not in all cases consider this agreement as binding on the seamen; but that it will, on application, relieve them from the operation of the above clause.

The case which settled this point, or perhaps, more properly speaking, opened it, for it was thought to have been settled before, is as follows:

—The ship *Juliana* sailed from London for New South Wales with convicts, which she landed, and took in a cargo for Port Jackson, where she arrived; she sailed thence with a cargo for Batavia, where she took in a fresh cargo; sailed for several ports, and arrived at Calcutta; discharged her cargo there, and finally loaded for London; for which she sailed, and after arriving in the Downs she struck on the Kentish-knock, and was lost with all her crew, except a seaman and another person. The seaman instituted his claim in the Admiralty Court for his wages; and the learned judge, after a very elaborate sentence, decided, that the plea put in by owners, setting forth the stipulation between them and the mariners, must be rejected, as the court was not disposed to lend its sanction to such a principle. The sentence is too long to be inserted here, we shall therefore only briefly state the grounds of it. The first and principal reason given by his lordship was, that the voyage in question was *a divided voyage*, delivery of the cargo having been made at a variety of ports; and that as such it came under the general law, the principles of which it was the duty of the court to apply. Freight, he observed, has been truly said to be “the mother of wages;” it was the only source of wages.

If that was lost, every thing was lost to the mariner. In this case, however, freight had been earned; and in all cases the owner might secure his freight by insuring it, and it would be a matter of indifference to him whether he got it from the freighters or the insurers. Other reasons appear to have led to the decision of the learned judge, which were,—the well-known *ignorance of the seamen*, and the *peculiar hardship of the stipulation* in the agreement; which indeed the Scotch courts had before stigmatised as inhuman and illegal.

In the above sentence Lord Stowell did not notice the situation of the owner by the loss of the ship, which in fact shows that it is not indifferent to him whether he receives the freight from the insurers or the freighters; because, if the ship be lost he will be relieved from the payment of wages altogether; thus reversing the equitable maxim, of *nemo debet locupletari alieni jactura*;—for the owner does really profit by the seamen's loss: he gaining the wages, by the same means as the seamen lose them. This is an additional argument for the revision of that part of the agreement, which it must be acknowledged bears so hard upon the mariners.

In the case of *Appleby v. Dodds*, tried before

• 8 East Rep.  
F. 304.

Lord Ellenborough\*, the plaintiff, who was one of the seamen, was nonsuited upon the construction of the agreement; which was in the usual words. From which we may infer,—that even when the voyage is divided, the crew are not by the English law entitled to their wages, if the ship be lost short of her final port of discharge.

It now, however, appears, that the Court of Admiralty, proceeding in equity, will grant them relief under the principles of the general law,

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## TO THE PRINCIPAL MATTERS.

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